2003

State of Utah v. Robert J. Bernert : Brief of Appellee

Utah Court of Appeals

Joanne C. Slotnik; Assistant Attorney General; Mark L. Shurtleff; Attorney General; Sandra Corp; Deputy Weber County Attorney; Attorneys for Plaintiff/Appellee.
Randall W. Richards; Attorney for Defendant/Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20030329-CA
ROBERT J. BERNERT,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

- - - - - - - -

APPEAL FROM A CONVICTION ON ONE COUNT OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1999), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE W. BRENT WEST, PRESIDING

JOANNE C. SLOTNIK (4414)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180

Sandra Corp
Deputy Weber County Attorney

Attorneys for Appellee

RANDALL W. RICHARDS (4503)
The Public Defender Association of Weber County
2568 Washington Blvd., Suite 200
Ogden, Utah 84401

Attorney for Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20030329-CA
ROBERT J. BERNERT,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION ON ONE COUNT OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-44 (1999), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE W. BRENT WEST, PRESIDING

JOANNE C. SLOTNIK (4414)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Attorney General
160 East 300 South, 6th Floor
Salt Lake City, Utah 84114
Telephone: (801) 366-0180

Sandra Corp
Deputy Weber County Attorney

Attorneys for Appellee

RANDALL W. RICHARDS (4503)
The Public Defender Association of Weber County
2568 Washington Blvd., Suite 200
Ogden, Utah 84401

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 20030329CA
ROBERT J. BERNERT,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction on one count of driving under the influence of alcohol, a third degree felony (R. 75-76). This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(2002).

STATEMENT OF THE ISSUE ON APPEAL AND STANDARD OF APPELLATE REVIEW

Did the trial court err in denying defendant's motion to dismiss, based on double jeopardy, where the court never entered a final judgment of conviction on an earlier charge arising out of the same criminal act, to which defendant pled guilty?

A trial court's decision to grant or deny a motion to dismiss presents a question of law, reviewed under a correctness standard. State v. Horrocks, 2001 UT App 4, ¶10, 17 P.3d 1145.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provision, statute or rule is dispositive in this case.

STATEMENT OF THE CASE

Defendant was originally charged with one count of driving under the influence of alcohol, a class B misdemeanor, to which he tendered a plea of guilty (R. 2; Tr. of 4/22/02 at 1-4). Upon request by the city prosecutor, the court refused to accept the plea and granted the city's motion to dismiss (Tr. of 4/23/02 at 1, 4-5).

The State then charged defendant with one count of driving under the influence of alcohol, a third degree felony (R. 4-5). Defendant entered a not guilty plea and moved to dismiss on double jeopardy grounds (R. 11, 33-38). After a hearing on the matter, the court denied the motion (R. 54-55, 56, 59-60).

Defendant then entered a conditional guilty plea, which the trial court accepted (R. 67-72; R. 1-6). The court subsequently sentenced defendant to zero-to-five years in the Utah State Prison (R. 75-76). Defendant filed a timely notice of appeal (R. 78).

STATEMENT OF THE FACTS

In April of 2002, Ogden City charged defendant with the class B misdemeanor offense of driving under the influence of alcohol or drugs (R. 1). At the arraignment hearing, defendant's counsel informed the court that defendant intended to plead

guilty (Tr. of 4/22/02 at 2). Following a plea colloquy, the following interchange occurred:

> The Court: Alright, the Court will make a finding that this plea has been knowingly and voluntarily entered into to the charge of DUI. How do you plead?
>
> Defendant: I pled [sic] guilty, Your Honor.
>
> The Court: Is there a breath or blood test?
>
> Prosecutor: Your Honor, there may be, but I don't have it.
>
> The Court: Recommendation, counsel?
>
> Def. Counsel: Is (inaudible) a blood test?
>
> The Court: No, he didn't have the results yet.
>
> Prosecutor: Your Honor, this is not his first offense. He did have an alcohol related reckless prior to this.
>
> The Court: Let's talk about that. . . .

(Id. at 4). The court then reviewed defendant's record, which reflected eight other alcohol-related crimes. Reflecting on defendant's "extensive record," the trial court commented, "So I'm kind of surprised that this isn't a Class A or a felony" (Id.).

At this juncture, as defense counsel began arguing for his client's counseling needs, the city prosecutor interrupted: "Your honor, at this point I would move the Court not to accept his guilty plea and I'll transfer [the case] to the county [for

prosecution as a felony]" (Id. at 5). The court continued the matter for a day, commenting, "We'll see if the city is going to stay with the charges or if they're going to file it as a felony. He's already entered his plea. I don't know if the city can do that but I'm going to continue it over one day and think about it" (Id.).

The following day, the city prosecutor explained to a different judge, "What I asked yesterday is that the Court refuse to accept [defendant's] plea which is, it's my understanding[,] is not a problem and that then the city is dismissing this as long as the county has filed" (Tr. of 4/23/02 at 1). The court granted the request without comment (Id.).

The State filed a single felony charge against defendant, and defendant responded with a motion to dismiss, arguing that the felony prosecution was barred by double jeopardy because he had already entered a guilty plea to the same crime previously charged as a misdemeanor (R. 33-38). The motion was heard by a third judge, who opined:

> [F]rom an objective standpoint, I'm prepared to say today that [the original judge] did not [accept the guilty plea] because he didn't say that he did. He didn't proceed to impose sentence. He asked for some preliminary information. . . . In other words, just because somebody says I plead guilty doesn't necessarily mean that the Court is obliged to accept that plea. It ought to accept the plea when it's fully appraised of the case and it's appropriate to accept the plea.

(R. 83: 5-6). Notwithstanding this determination, the court sent the case back to the original judge to determine "whether he, in his mind[,] accepted the plea" (Id.).

The original judge listened to the tape of the disputed proceeding and to the arguments of the parties. He then ruled that he had not accepted the plea:

> I'll be candid. [Defendant] entered his plea. I was surprised that he entered his plea in the first place because I was looking at his record at the time that they handed up his OR. We had discussed the issue of whether or not he was going to be released or not and I had his OR and when I asked for the breath test and then I asked for his record, at that point the city spoke up . . . saying that he did not want me to accept the plea and then there's some shuffling as he checks with the record. My honest opinion is I took the plea but I never accepted it, I never intended to go ahead and sentence on the particular issues.

(R. 83: tab 1 at 3); see also R. 54-55 at addendum A (findings of fact).

With this subjective confirmation of his previously-articulated objective point of view, the third judge denied defendant's motion to dismiss (R. 59-60 at addendum B). The court reasoned that because defendant's tendered guilty plea to the misdemeanor charge had not been accepted, double jeopardy did not attach to that prosecution. Consequently, the State was free to file the charge anew as a felony without violating the constitutional prohibition against double jeopardy. Id.

Defendant then entered a conditional guilty plea to the felony DUI charge, reserving his right to appeal the denial of his motion to dismiss (R. 67-72). The court sentenced him to zero-to-five years in the Utah State Prison, and he filed this timely appeal (R. 75-76, 78).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION TO DISMISS ON DOUBLE JEOPARDY GROUNDS BECAUSE THE COURT DID NOT ENTER A FINAL JUDGMENT OF CONVICTION IN THE MISDEMEANOR CASE AND, CONSEQUENTLY, JEOPARDY DID NOT ATTACH

The gist of defendant's argument is that when he uttered the words "I plead guilty" to the misdemeanor charge of DUI, the plea was "entered," and double jeopardy attached.[1] Consequently, when the court later granted the city's request to dismiss the charge, the State was constitutionally precluded from refiling it as a felony. See Br. of Aplt. at 12-13. This argument fails as a matter of law.[2]

This Court has recognized the principle that "[j]eopardy attaches when a plea is accepted by a trial court." State v. Horrocks, 2001 UT App 4, ¶25, 17 P.3d 1145; accord State v. Kay,

---

[1] Defendant also argues that the trial court's request for a sentencing recommendation evidences his implicit acceptance of the guilty plea. See Br. of Aplt. at 22-23.

[2] Defendant also asserts that the withdrawal of the plea cannot be justified under the theory of a misplea. See Br. of Aplt. at 15-19. The trial court did not render its ruling on this basis, nor need this Court reach it as an alternative ground for affirmance.

717 P.2d 1294, 1303 (Utah 1986). More recently, the Utah Supreme Court has held that the statutory term, "entry of the plea," refers to the date of entry of final judgment of conviction. State v. Ostler, 2001 UT 68, ¶11, 31 P.3d 528 (holding that 30-day limit on withdrawal of guilty plea runs from date of entry of final judgment of conviction, which constitutes final disposition of case in district court); see also State v. McGee, 2001 UT 69, ¶8, 31 P.3d 531 (interpreting Utah Code Ann. § 77-13-6(2)(b), governing plea withdrawals and stating that "[i]n the context of criminal cases, '[the] sentence . . . is [the] final judgment,' State v. Soper, 559 P.2d 951, 953 (Utah 1977), and is the event that triggers the 'entry' of the plea within the meaning of the statute"). Under these cases, then, a guilty plea is not accepted until the court enters judgment and sentences the defendant.

Explaining the rationale for this rule of law, the supreme court has noted that "it makes no sense to deprive the district court of the power to review a plea before it enters a judgment of conviction and sentence." Ostler, 2001 UT 68, ¶10. In the interests of justice, pleas must be "subject to review up until the time of sentencing." State v. Casey, 2002 UT 29, ¶39, 44 P.3d 756. Such flexibility permits the trial court, in the interests of justice, to assess the plea in light of whatever information about defendant is or becomes available. Such information "may occasionally produce information affecting the

validity of the plea or the actual guilt of the defendant." Ostler, 2001 UT 68, ¶10.

Thus, since jeopardy does not attach until the plea is accepted, Horrocks, and the plea is not accepted until judgment is entered, Ostler, jeopardy does not attach until judgment is entered.

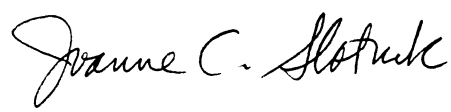
In this case, after defendant tendered his plea but before the court accepted it by entering judgment, the court reviewed defendant's history and realized that defendant had an extensive history of similar crimes. See Tr. of 4/22/03 at 4. Having not yet entered judgment, the court retained the right to reject the plea and dismiss the case so that the prosecutor could more appropriately file it as a felony. Ostler, 2001 UT 68, ¶10.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction on one count of driving under the influence of alcohol, a third degree felony.

RESPECTFULLY submitted this 8th day of January, 2004.

MARK L. SHURTLEFF
Attorney General



JOANNE C. SLOTNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Randall W. Richards, attorney for appellant, The Legal Defender Association of Weber County, 2568 Washington Blvd., Ogden, Utah 84401, this 8 day of January, 2004.

Joanne C. Slotnik

Addendum A

SANDRA L. CORP 4411
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD., 2ND FLOOR
OGDEN, UTAH 84401
TELEPHONE: (801) 399-8377

**IN THE SECOND DISTRICT COURT, WEBER COUNTY,
STATE OF UTAH**

STATE OF UTAH, Plaintiff, vs. ROBERT J. BERNERT, Defendant.	FINDINGS OF FACT ON ISSUE OF PRIOR PLEA PROCEEDINGS BEFORE JUDGE W. BRENT WEST Case No.021901715 Judge: MICHAEL D. LYON [W. BRENT WEST]

This case was referred to this Court for clarification of an issue of fact regarding a prior plea proceeding in a dismissed Ogden City case involving the same offense. The parties agreed that this Court should clarify whether it had accepted a plea of guilty to the offense in case number 025904348 on April 22, 2002. This Court reviewed the audio tape of the April 22 hearing and issued its oral findings on October 23, 2002. Counsel for both parties were present. This Court now enters the following:

1. Ogden City charged defendant with Driving Under the Influence of Alcohol, a class B misdemeanor, based upon citation # D449693 dated April 20, 2002.

2. Defendant appeared before this Court at video arraignments to answer the charge on April 22, 2002 in case number 025904348.

3. Defendant stated that he pleaded guilty to the charge at that time.

4. This Court conducted a Rule 11 colloquy, found that the plea was knowing and voluntary, and then inquired about Defendant's prior record but did not indicate acceptance of the plea.

5. Prior to a sentence being imposed, the City moved to dismiss the case so that it could be filed by the Weber County Attorney's Office as a third degree felony based upon Defendant's prior record.

6. This Court stayed the proceedings and continued the matter one day to allow the City to further argue its motion to dismiss.

7. This Court did not accept Defendant's guilty plea on April 22, 2002.

DATED this 4TH day of November, 2002.

BY THE COURT:

W. BRENT WEST
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Findings was mailed to: Kent E. Snider, Attorney for Defendant, 289 24th Street, Ogden, UT 84401 this 25 day of October, 2002.

Addendum B

SANDRA L. CORP 4411
WEBER COUNTY ATTORNEY'S OFFICE
2380 WASHINGTON BLVD., 2ND FLOOR
OGDEN, UTAH 84401
TELEPHONE: (801) 399-8377

IN THE SECOND DISTRICT COURT, WEBER COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ROBERT J. BERNERT, Defendant.	CONCLUSIONS OF LAW AND ORDER ON ISSUE OF PRIOR PLEA PROCEEDINGS BEFORE JUDGE W. BRENT WEST Case No.021901715 Judge: MICHAEL D. LYON

This case was referred to Judge West for clarification of an issue of fact regarding a prior plea proceeding in a dismissed Ogden City case involving the same offense. Judge West entered Findings of Fact establishing that Defendant's plea was not accepted in the prior prosecution. Based upon the Findings of Fact entered by Judge West, this Court now enters the following:

CONCLUSIONS OF LAW

1. Jeopardy did not attach in the prior case when Defendant merely tendered a plea that was not accepted by Judge West.

2. Because jeopardy did not attach in the prior prosecution prior to it being dismissed, the State was free to refile the charge as a third degree felony in this case.

Based upon the foregoing conclusions of law, the Court now enters the following:

ORDER

Defendant's motion to dismiss on the grounds of double jeopardy is denied.

DATED this 11 day of December, 2002.

BY THE COURT:

MICHAEL D. LYON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Findings was mailed to: Kent E. Snider, Attorney for Defendant, 289 24th Street, Ogden, UT 84401 this 2 day of December, 2002.