

FILED
May 12, 2016
Court of Appeals
Division I
State of Washington

No. 73311-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

STEVEN HOUSER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. Reversal is required because of the DUI prejudice where the court failed to timely preclude the prosecutor from mentioning the defendant’s 4 priors were “DUI” or the like in Opening Statement. 1

 2. Mr. Houser’s right to unanimity was violated in these circumstances, and the presence of substantial evidence on both means does not cure the constitutional error 6

 3. Mr. Houser was unable to search for and find the true driver of the car, but the prosecutor was allowed to tell the jury to hold it against Mr. Houser that he was unable to. 7

B. CONCLUSION 8

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Case, 189 Wn. App. 422, 358 P.3d 432 (2015), review granted, 185 Wn. 2d 1001 (2016) 4

State v. Chambers, 157 Wn. App. 465, 474, 237 P.3d 352 (2010), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011) 1

State v. Garcia, 177 Wn. App. 769, 313 P.3d 422 (2013) 5

State v. Rivera, 95 Wn. App. 132, 992 P.2d 1033 (2000) 5

State v. Lizarraga, 191 Wn. App. 530, 364 P.3d 810, 829 (2015), review denied, (Wash. Apr. 27, 2016) 6

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008) 8

State v. Owens, 180 Wn. 2d 90, 323 P.3d 1030 (2014) 6

STATUTES AND COURT RULES

RCW 46.61.502. 7

RCW 46.61.5055 1

UNITED STATES SUPREME COURT CASES

Old Chief v. United States, 519 U.S. 172, 136 L.Ed.2d 474, 117 S.Ct. 644 (1997) 2,3

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. 14 8

A. REPLY ARGUMENT

1. Reversal is required because of the DUI prejudice where the court failed to timely preclude the prosecutor from mentioning the defendant's 4 priors were "DUI" or the like in Opening Statement.

The Respondent does not dispute the material procedural facts of this case, in which Mr. Houser is arguing that the trial court should have prevented the prosecutor from telling the jury in Opening Statement about the DUI (driving under the influence, and the like) nature of Mr. Houser's prior convictions. AOB, at pp. 6-8. In this Felony DUI case, the fully adequate stipulation language was always that which stated, taken verbatim from the statute itself, the essential element of the crime – i.e. , that the defendant had four or more prior offenses within ten years “as defined in RCW 46.61.5055.” See RCW 46.61.502.

This was ultimately the same basic stipulation language that the prosecutor, mid-trial, conceded was adequate. Juries are not given the definitions of elements, which is what adding any sort of DUI language would be in this particular case. See AOB, at pp. 8-14 ; see also State v. Chambers, 157 Wn. App. 465, 474, 237 P.3d 352

(2010), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011)

(whether California DUI conviction was comparable for Felony DUI element's purpose was initial question of law for court; jury merely decides whether prior convictions exist).

The error below occurred pre-trial, where the trial court should have accepted, under the mandatory obligation of Old Chief, the defense's adequate stipulation to the above language. Old Chief requires the court to accept a stipulation in these circumstances. Old Chief v. United States, 519 U.S. 172, 136 L.Ed.2d 474, 117 S.Ct. 644 (1997). The stipulation was completely acceptable because "DUI" is not part of the statutory element's language. AOB, at pp. 8-14.

In response, the Respondent argues that, at the time of Opening Statements there was some "initial language" discussed, but as yet no final signed stipulation of the parties. BOR, at pp. 10, 13, 18. The Respondent also portrays the defense as at some point agreeing that DUI language should be a part of the stipulation. BOR, at pp. 11-13, 18. This is incorrect.

It is true that the defense, when Opening Statements commenced, was still in the process of attempting to not have any reference to DUI or the like, in the stipulation. But the Respondent characterizes the in limine discussions about this topic as somehow showing that the matter was highly debatable and complex, and thus properly unresolved. This is not what happened. The Old Chief question is about whether a proper stipulation must be accepted if an accused proffers it, and the second issue is whether it would be necessary to affirmatively add "DUI" to this particular case's stipulation for jury purposes. The answer to the first is yes, and the answer to the second is no.

As the opening brief contends, the defense from the beginning argued for a stipulation without any DUI reference. This was the problem the defense had described as occurring in Mr. Houser's prior trial, where DUI language erroneously made it into the written stipulation. The Respondent at page 16 of its Brief similarly asserts that the defense at the pre-trial stage "wasn't willing to stipulate." BOR, at p. 16. This is not accurate. What the defense wanted (first) was a bifurcated trial, rather than a

stipulation; when bifurcation was denied, the defense made clear it wanted a stipulation that didn't mention DUI, and thus would not provide authority for the State to mention "DUI" in Opening Statement. AOB, at pp. 16-18. See also, State v. Case, 189 Wn. App. 422, 358 P.3d 432 (2015), review granted, 185 Wn. 2d 1001 (2016) (underlying legal validity of no-contact orders was not part of prior offenses element such that it should be in instructions).

Mr. Houser respectfully argues that the Respondent shouldn't be allowed to excuse its prejudicial interjection of "DUI" into Opening Statement under the rationale that pre-trial obstructionism by the defense had prevented the issue from being resolved. At the pre-trial hearings, the only reason there was any debate by the parties was because of the prosecutor's repeated, but later abandoned assertions that DUI language needed be added to the element's stipulation in order to prove the crime.

The defense had been proffering proper stipulation language, excluding this DUI reference, multiple times by motions in limine in the days prior to trial, and the trial court, at the time of those first requests, should have made its ruling that the

stipulation, without any DUI reference, was one it was obliged to allow under Old Chief.

The State's cited cases are inapposite; thus State v. Garcia is about assessing *harmfulness* in a mistrial motion made after a VUFA jury briefly saw a draft version of a stipulation which stated the robbery-type nature of the accused's prior qualifying serious offense. The case does not stand for the proposition that the State is entitled to reveal to a jury the DUI nature of qualifying prior offenses under RCW 46.61.502. See BOR, at pp. 16-18, 21 (citing State v. Garcia, 177 Wn. App. 769, 772-75, 313 P.3d 422 (2013); State v. Rivera, 95 Wn. App. 132, 139, 992 P.2d 1033 (2000) (issue of harmfulness of the error)).¹

The defense offer to stipulate should have earlier been accepted, and thus the prosecutor should have been precluded from mentioning "DUI" in Opening Statement – as the defense moved for. As argued in the opening brief, reversible prejudice

¹ The Respondent's cited case involving Puyallup as a litigant appears to be unpublished and in any event it supports Mr. Houser's arguments.

accrued to Mr. Houser as a result of this error, requiring a new trial. AOB, at pp. 12-14 and note 2.

2. Mr. Houser’s right to unanimity was violated in these circumstances, and the presence of substantial evidence on both means does not cure the constitutional error.

Mr. Houser relies on the arguments in his Opening Brief that the entire circumstances of the case, evidentiary, instructional, and in closing argument, demonstrate a violation of Mr. Houser’s right to unanimity in an alternative means case. In these circumstances, substantial evidence on both means cannot cure the constitutional error. AOB, at pp. 14-27.

The State’s cited case of State v. Lizarraga, decided recently, does not address the issue – that case relied summarily on Owens, an earlier decision where the Supreme Court simply decided that the language of a certain trafficking statute did not set out multiple means in the first place, thus never reaching the matter. State v. Lizarraga, 191 Wn. App. 530, 565, 364 P.3d 810, 829 (2015), review denied, (Wash. Apr. 27, 2016) (citing State v. Owens, 180 Wn. 2d 90, 95, 100, 323 P.3d 1030 (2014)).

3. Mr. Houser was unable to search for and find the true driver of the car, but the prosecutor was allowed to tell the jury to hold it against Mr. Houser that he was unable to.

Mr. Houser relies on the arguments in his Opening Brief, and emphasizes that the DUI context of the present case is a part of what made it error for the trial court to give the instruction as the State requested, which pertained to the driver of the car, Gary. AOB, at pp. 20-27; RCW 46.61.502.

More importantly, as a matter of the existing record of trial below, contrary to the State's arguments, Mr. Houser *did* satisfactorily explain why he was unable to search and procure the attendance of this witness. This is why it was improper, both as an instructional matter, and as a matter of shifting the burden of proof, for the State to be allowed in closing argument to tell the jury it could hold it *against* the defendant that this witness had not been presented by the defense. BOR, at p. 29; AOB, at pp. 22-26; see State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008); U.S. Const. amend. 14.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Houser requests that this Court reverse the judgment and sentence of the trial court.

DATED this 11 day of May, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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STEVEN HOUSER,)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MAY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MAY, 2016.

X _____ 