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Summary of Gordon v. State, 121 Nev. Adv. Op. 51

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Gordon v. State, 121 Nev. Adv. Op. 51 (August 11, 2005)¹

CRIMINAL LAW – DRIVING UNDER THE INFLUENCE

Summary

In this case, the Court considered two issues related to DUI charges against appellant. First, whether a jury may return a general guilty verdict based upon several legally sufficient theories of driving under the influence if at least one theory had sufficient evidentiary support. Second, whether the appellant was prejudiced by the State's failure to gather evidence during its investigation.

After a review of the evidence presented at trial, the Court concluded that a jury may return a general guilty verdict even when only one of several theories had sufficient support, and that the appellant here was not prejudiced by the State's failure to gather particular evidence during its investigation.

Disposition/Outcome

The Court affirmed the conviction upon jury verdict of DUI causing substantial bodily harm.

Factual and Procedural History

Appellant Elwin Ray Gordon was charged with driving under the influence causing substantial bodily harm after his vehicle collided with a motorcycle, injuring the motorcyclist in June of 2002. At the scene, the training investigating deputies noted that Gordon's eyes were bloodshot and watery, his breath smelled of alcohol and his speech was mildly slurred. Gordon submitted to a horizontal gaze nystagmus field test, which he failed. After he was arrested, Gordon exhibited a blood alcohol concentration of 0.10.

At trial, a toxicology expert for the State acknowledged that chances were "fifty-fifty" that the actual BAC value was 0.099, while a clinical chemist testified that at 0.10 all persons would experience measurable effects. Gordon himself testified that he had consumed six and one half beers on the evening of the accident. Based on a number of photographs of the accident scene, one of the investigating officers acknowledged that there were inaccurate measurements and omissions in the accident reconstruction diagram and that he did not keep field notes on a recording device.

The jury was instructed on three theories upon which they could convict Gordon according to NRS 484.3795 (2002) (amended 2003): (1) being under the influence of intoxicating liquor, rendering him incapable of safe driving; (2) having a BAC of 0.10 or more; and/or (3) having a BAC of 0.10 or more by measurement within two hours of driving. The jury could also return a general guilty verdict without specifying a particular theory if they unanimously found beyond a reasonable doubt that at least one of

¹ Summarized by Bryce C. Loveland

the three theories was proven beyond reasonable doubt. In finding Gordon guilty, the jury did not specify a particular theory but chose this last option. The district court denied Gordon's motion for a new trial or acquittal and entered a judgment of conviction. Gordon now appeals.

Discussion

A. Validity of the jury's verdict

Gordon argues that the jury's verdict was not supported by substantial evidence because two of the three theories of guilt were premised upon a BAC of 0.10 and factoring in variance or margin of error Gordon's BAC reading could have been 0.099. Because the jury returned a general guilty verdict, Gordon contends that this allows for the possibility that the jury found Gordon guilty on one of the theories not supported by sufficient evidence. Thus, the entire verdict is tainted and should be reversed. The Court did not agree.

After quoting a previous United States Supreme Court case² and a Nevada Supreme Court case³ squarely on point with the issue of general guilty verdicts, the Nevada Supreme Court concluded that as long as there is sufficient evidence of at least one of the theories of guilt, the general guilty verdict may stand.

Here, Gordon only challenges two of the three theories of guilt. Thus, the jury's general guilty verdict may stand if there is sufficient evidence to support the unchallenged theory that Gordon was driving under the influence of intoxicating liquor under NRS 484.3795(1)(a). Evidence that Gordon was driving under the influence includes: the fact that Gordon had consumed six and one half beers that evening; the investigating deputies' testimony that Gordon exhibited signs of intoxication; Gordon failed the horizontal gaze nystagmus field test; and Gordon yielded a BAC result of 0.10. The Court concluded that viewing all of this evidence in a light most favorable to the prosecution, a rational jury could have found beyond reasonable doubt that Gordon was driving under the influence of intoxicating liquor when he hit the motorcyclist.

B. The State's investigation

Gordon argues that the State's investigation was lacking and inept to the degree that it denied him due process because it hampered his defense. He contends that he was prejudiced to the extent that inaccurate measurements were taken during the investigation and that critical objects were omitted in the accident reconstruction program. He also contends that he was prejudiced because only a single blood draw was obtained when a series of blood draws is usually ordered.

² Schad v. Arizona, 501 U.S. 624, 631 (1994).

³ Rhyne v. State, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002).

The Court explained that there is a two-part test in Nevada to determine whether dismissal of charges is warranted due to the State's failure to gather evidence.⁴ First, the defense must show that the evidence was material to the outcome of the proceedings. Second, if the evidence was material, whether the failure to gather that material evidence was a result of negligence, gross negligence, or bad faith. Even when both requirements are met, however, in the case of mere negligence, no sanctions are imposed. Rather, the defendant can examine the State's witnesses about the investigative deficiencies. In the case of gross negligence, the defense is entitled to a presumption that the evidence would have been unfavorable to the State. In the case of bad faith, depending on the case as a whole, dismissal of the charges may be warranted.

The Court concluded that the missing evidence was not material to the outcome because there was a reasonable possibility that the result of the proceedings would have been the same. The Court notes, however, that as for the blood evidence, a series of blood draws could have shown a lower BAC level which could have made a difference in this case because it was evidence used in supporting Gordon's conviction for driving under the influence. Nevertheless, Gordon did not show that the failure to gather this evidence rose to the level of gross negligence. Taking into account the investigating officers' trainee status, the Court found that the failure to gather evidence was mere negligence at most. In the case of negligence, the defendant may examine the State's witnesses regarding investigative deficiencies. This opportunity was afforded to Gordon at trial. Thus, the Court concluded that Gordon failed to demonstrate prejudice.

Conclusion

The Court concluded that Gordon's conviction must stand because there was substantial evidence to sustain any one of the three legally sufficient theories of DUI upon which the jury's general guilty verdict rested, and that the State did not fail to properly investigate, gather, or preserve evidence. Even if it did it was mere negligence and Gordon was afforded the appropriate remedy at trial.

⁴ *Citing*, *Randolph v. State*, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001); *Daniels v. State*, 114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).