

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 6709

STATE OF ARIZONA

v.

ROBERT LOUIS BEARD

MARICOPA COUNTY
SUPERIOR COURT
NO. CR 22837

TRANSMITTAL DATE

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,

Appellee,

vs.

ROBERT LOUIS BEARD,

Appellant.

NO. 1 CA-CR 6709

DEPARTMENT A

MARICOPA County
Superior Court
No. LCA 22837

APPELLANT'S OPENING BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED MAR 2 1983

GLEN D. CLARK, CLERK

By W. S. [Signature]

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NATURE OF THE CASE

Appellant, ROBERT LOUIS BEARD, was charged in The Mesa City Court with "Driving a Motor Vehicle Under the Influence of Intoxicating Liquor" in violation of A.R.S. Section 28-692(A) on January 16, 1981. Following a trial to a jury, Appellant was convicted and sentenced to pay a fine of \$250.00 and to serve 1 day in jail.

A timely notice of appeal was perfected to the Maricopa County Superior Court. Although the Superior Court determined that two of Appellant's assignment of errors were well-founded, the Court refused to reverse finding a lack of "prejudicial" error.

Appellant subsequently perfected his appeal from

". . . that portion of the order of the Maricopa County Superior Court in the above-entitled action dated August 19, 1982, affirming the judgment of guilt and sentence entered and imposed in the Mesa City Court (T81-1728) on October 9, 1981, which failed to sustain defendant's contentions relating to the VALIDITY OF THE STATUTE INVOLVED."

This Court has jurisdiction pursuant to A.R.S. Section 22-375 and A.R.S. Section 12-2101.

STATEMENT OF THE CASE

At approximately 1:00 a.m. on January 16, 1981, a Mesa police officer observed the Appellant's vehicle stall as the light turned green at the intersection of Lindsay Road and Main Street in Mesa, Arizona. (R.T. p. 78). The officer had been observing the vehicle for some time and, although he had not observed any illegal traffic maneuvers (R.T. pp. 114, 123), a vehicle stop was initiated by the officer. This stop resulted in a traffic complaint being initiated by the officer charging the Defendant was a violation of A.R.S. Section 692(A)—Driving a Motor Vehicle Under the Influence of an Intoxicating Liquor. (Doc on Appeal #1).

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Prior to trial, Appellant filed a Motion to Dismiss the charges against Appellant based upon a claim of the unconstitutionality of the D.W.I. statute. (Doc on Appeal #6). The State responded (Doc on Appeal #11) and argued that criminal intent was required neither for conviction under the statute nor to save the statute from unconstitutional overbreadth.

The State prevailed and the Motion was denied. (Doc on Appeal #14).

Appellant introduced evidence at trial which tended to show that he was a heart patient who took regular medication for this condition. (R.T. pp. 297-298) He also introduced evidence tending to show that he was, at the time, undergoing severe stress over marital difficulties which had affected his sleep. (R.T. pp. 296-297, 299-399). This, in turn, had resulted in chest pains and an increased intake of the heart medication. (R.T. p. 302). The defense attempted to establish that side-effects of prescription medication taken by the defendant included symptoms which would be mistaken for intoxication.

The defense evidence showed that Appellant had consumed substantially fewer alcoholic-content drinks than indicated by the State's breath-testing device. (R.T. p. 313). Expert testimony was received in evidence designed to prove, inter alia, that the State's breath-testing devices could have been influenced by the prescription medications as well as by any alcoholic breath measured by the machine giving an erroneously high reading. (R.T. pp. 269-291).

Following Appellant's conviction the matter was appealed to the Maricopa County Superior Court. When the Superior Court refused to sustain Appellant's contentions regarding the validity of the statute involved, this appeal followed.

ARGUMENT

Legislative regulations of drivers who drink intoxicating beverages has

been around for a long time. While the freedom to travel and, hence, "driving" and the freedom to "drink" both appear to be afforded a degree of constitutional protection (Schechter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963); United States Constitution, Amendment XXI), the trend in recent years has been to restrict, with increasing severity, the combination of the two under the general state police powers to provide for public safety. While this appeal does not involve the most recent legislative efforts in this regard, it is the contention of this brief that the legislative has, in fact, transgressed fundamental constitutional principles in its efforts to deal with the problems of criminal behavior in general.

A brief summary of the development of D.W.I. legislation over the years is necessary to an understanding of the contentions advanced in this brief.

HISTORICALLY, LEGISLATIVE PROHIBITIONS
AGAINST DRINKING AND DRIVING WERE
DEFINED SOLELY IN TERMS OF COMMON
UNDERSTANDING

Prior to 1927, the Arizona legislature declared that only those drivers who were "drunk" or "intoxicated" would be treated as criminals. In 1927 (Laws 4th Sp. Sess. 1927, chap 2, subc 6, Section 1), however, the law was changed so that it read "under the influence of intoxicating liquor." As stated in Hasten v. State, 35 Ariz. 427, 280 P. 670 (1929):

"Our legislature, it will be seen, required at first that the offender should be under the influence of liquor to the point of actual intoxication, but evidently became convinced that many persons who had not yet arrived at that state were a menace to public safety when driving a motor vehicle, and in order so far as possible to remove danger from an admixture of liquor and gasoline provided that any person 'influenced' by the former, without specifying the extent to which such influence must go, must himself abstain from using the latter in an automobile." 35 Ariz. at 432-431.

In sustaining the state's position in that case, the Arizona Supreme

Court relied upon and quoted from State v. Rodgers, 91 N.J.L. 212, 102 Atl. 433, 435, referring to a similar statute:

"It will be noticed that it is not essential to the existence of the statutory offense that the driver of the automobile should be so intoxicated that he cannot safely drive a car. The expression, 'under the influence of intoxicating liquor,' covers not only the well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition, which is the result of indulging in any degree of intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess. So one driving an automobile upon a public street while under the influence of intoxicating liquor offends against the Act, even though he drives so slowly and so skillfully and carefully that the public is not annoyed or endangered." 35, 430.

Clearly, after the decision in Hasten, supra, a strict or technical application of the 1927 statute would border on criminalizing innocent and constitutionally protected behavior. The common law requirement of mens rea, however, prevented such a strict or hyper-technical application of the statute. Steffani v. State, infra.

It is a fundamental requirement of due process that a criminal statute must be stated in terms which are reasonably definite so that a person of ordinary intelligence will know what the law prohibits or commands. Connally v. General Construction Co., 269 U.S. 385; United States v. Petrillo, 332 U.S. 1; State v. Limpus, 128 Ariz. 371, 625 P.2d 960 (1981); State v. Swanton, 129 Ariz. 131, 629 P.2d 98 (1981). This concept promotes fairness to the defendant in two respects. First, it insures that the defendant will receive adequate warning of what the law requires so that he may act lawfully. "The underlying principle is that no man shall be held criminally responsible for conduct for which he could not reasonably understand to be proscribed." United States v. Harriss, 347 U.S. 612. Secondly, it serves to prevent arbitrary and discriminatory enforcement

by requiring "boundaries sufficiently distinct" for police, judges, and juries to fairly administer the law. Patachristou v. City of Jacksonville, 405 U.S. 156.

In Weston v. State, 49 Ariz. 184, 65 P.2d 652 (1937), the Arizona Supreme Court grappled with a constitutional challenge attacking the vagueness of the terms "under the influence" when the legislature failed to specify any "degree of influence." In holding that these terms could pass constitutional muster, our Supreme Court held that these terms had a sufficiently definite meaning to the common man:

"The legislature employed the expression, 'under the influence of intoxicating liquor' in the sense in which the public had understood and used it long before this statute was passed, and according to the holding in Welch v. State (citation omitted), it requires not definition or explanation. In State v. Graham (citation omitted) the court said that it is in common, everyday use by the people, is older than the law in which it appears, and when used in reference to the driver of a vehicle on the public highways appears to have a well-understood meaning, which it described in this language: 'When a person is so affected by intoxicating liquor as not to possess that clearness of intellect and control of himself that he otherwise would have, he is under the influence of intoxicating liquor.'" 49 Ariz. at 186-187. (Emphasis supplied.)

The court observed that:

"One drink might have this affect, depending upon the person, while more than one drink in the case of another would not, for intoxicating liquor does not affect all people alike. And, besides, that term, though it may have a more or less definite meaning in the minds for those accustomed to using intoxicants, does not always mean the same thing." 49 Ariz. at 188-189.

Consequently, the courts of this state have consistently held that the "slightest" degree of influence is sufficient to convict. Davis v. Waters, 103 Ariz. 87, 436 P.2d 906 (1968); Noland v. Wootan, 102 Ariz. 192, 427 P.2d 143 (1967); State v. Duguid, 50 Ariz. 276, 72 P.2d 435 (1937).

THE LEGISLATIVE PRESUMPTIONS HAVE
SERVED TO ALTER THE "SLIGHTEST
DEGREE" STANDARD FORMULATED BY
THE JUDICIARY OVER 50 YEARS AGO

With the advent of chemical breath testing in the 1940's, D.W.I. legislation again underwent revision. In 1950, a trinity of presumptive legislative standards found their way into Arizona penal statutes calling for (1) presumptive influence, (2) presumptive non-influence, and (3) no presumption based upon blood-alcohol levels as determined by testing breath. A.C.A. Supp. 1952, Section 66-156. Presumptive influence was, by statute, found when the blood-alcohol level (as measured by the breath) reached .15 mg. percent. In 1972, the level of presumptive influence was lowered to .10 mg. percent.

In State v. Harold, 74 Ariz. 210, 246 P.2d 178 (1952), the Arizona Supreme Court upheld the legislature's authority to fix such presumptions:

"The Legislature was entirely within its powers to set up such standards based upon scientific facts which experiments had demonstrated fixes the point in an alcoholic content of the blood where sobriety ends and insobriety begins." 74 Ariz. at 217 (Emphasis Supplied).

At the present time, the law presumes that at blood-alcohol levels of .05 or less, a person is not under the influence.

Thus the Legislature has mandated that a person may be "slightly affected" and yet, if his blood alcohol has not yet reached .05 percent will be presumed by law not to be under the influence. Attempts to harmonize this perplexing state of affairs have served to confuse juries at best, and, at worst, leave them without a workable basis for deciding guilt or innocence.

At the present time, there is a conflict between the legislature and the judiciary as to whether "slightest degree" standard has been legislatively over-ruled by this trinity of legislative presumptions. See, e.g. City of Topeka v. Martin, 604 P.2d 218 (Kan. App. 1979):

"While it is true that a statute does not define a 'degree of intoxication', it is obvious that the Legislature had something more in mind than a mere determination that defendant's faculties were impaired, however slight. This is shown by the Legislature enacting K.S.A. 1978 Supp. 8-1005, which provides, in part, that there was less than .10 (Arizona .05) percent by weight per volume of blood, defendant would be presumed not to be under the influence of intoxicating liquor. It is apparent that the statute contemplates something more than the slightest of impairments." 604 P.2d 75 (Emphasis Supplied).

In State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962), the Arizona Supreme Court noted, in disapproving of the use of unstipulated polygraph evidence, that the major danger in the use of such evidence was that the jury would substitute its own judgment to that of a machine. Clearly, such a danger now exists in Arizona. No longer can it be said that "under the influence" is clearly understood by the common man. Not even the courts can agree on its meaning. On the contrary, it is technically defined in terms of blood chemistry that requires expert testimony at trial and cannot be ascertained at all without expensive machinery, equipment, and training.

Surely this court is aware of the tremendous recent publicity concerning the passage of the new DWI legislation. Newspapers, television, and radio all clamor the "safe", "intermediate" and "danger" zones of persons drinking, replete with graphic charts showing body weight, number of drinks consumed, and other factors necessary to inform the citizenry of prohibited conduct. Such information conveys to the public the impression that "slight" affectation, i.e., less than the presumption is perfectly acceptable behavior for carriage upon the streets and highways of the state. However, such commonly understood information is indeed "a trap for the unwary" due to this conflict between the judiciary and Legislature.

PRIOR TO 1978, THE OVERBREADTH
PROBLEMS INHERENT IN THE BROAD
SCOPE OF CURRENT D.W.I. LEGISLATION
WERE OVERCOME BY A LEGISLATIVELY
MANDATED REQUIREMENT OF MENS REA

Prior to 1978, old A.R.S. Section 13-101 provided that a violation of law for which imprisonment or a fine may be imposed upon conviction was a CRIME. Old A.R.S. Section 13-131 provided:

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence."

Thus at a minimum, (under prior law) the State was required to prove that (1) the defendant committed an act prohibited by law, and (2) did so with at least criminal negligence (mens rea).

In Steffani v. State, 45 Ariz. 210, 42 P.2d 615 d(1935), the Arizona Supreme Court observed that the defendant, in a D.W.I. case, was ENTITLED to an instruction on criminal negligence as a prerequisite to his guilt in such a prosecution.

Culpable negligence (criminal negligence) in a criminal case requires a higher degree of negligence than required to establish negligent fault in a civil case. State v. Sorenson, 104 Ariz. 503, 507, 455 P.2d 981 (1969):

"The negligence must be aggravated, culpable, gross, or reckless." 104 Ariz. at 507-508.

Thus, criminal liability did not attach until a driver was criminally negligent (and, hence, morally culpable) in allowing his blood alcohol levels to exceed the point where "sobriety ended and insobriety began." The difficulty of a common man in determining the exact point of affectation where sobriety became insobriety is not so important when he must be, at least, "reckless" or "negligent" in an "aggravated" manner in failing to perceive the point of debarkation. Clearly, the pre-1978 mens rea requirements of Arizona Statutes protected D.W.I. legislation from constitutional vagueness and overbreadth problems.

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Old A.R.S. Section 13-134 also provided relevant guidance in vehicular crimes:

"The following persons shall not be punished for their acts and omissions:

"3. Those who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence." (Emphasis supplied).

However, the New Criminal Code has repealed all of the aforementioned criminal statutes applicable to traffic violations.

THE LEGISLATIVE REPEAL OF THE MENS REA REQUIREMENT HAS INFLICTED CONSTITUTIONAL INFIRMITY UPON CURRENT D.W.L. LEGISLATION

The New Criminal Code does indeed purport to govern traffic offenses.

A.R.S. Section 13-102(D) provides:

". . . the provisions of this title shall govern the construction of and punishment for any offense defined outside of this title."

However, the new code creates something new to Arizona jurisprudence - STRICT LIABILITY!! See, A.R.S. Section 13-201. Criminal negligence is no longer the minimum mental state required by the law for the imposition of criminal penalties. The minimum requirement is no mental state at all! State statutes may now be construed as requiring no mental intent at all.

The New Code goes further, however. It MANDATES a construction of strict liability unless the statute "expressly provides a culpable mental state." See, A.R.S. Section 13-202(B).

The statute with which Defendant is charged fails to provide for any mental state whatsoever. The repeal of the prior law governing traffic offenses accomplished by the New Criminal Code and the affirmative enactment of strict liability in Arizona means that no criminal intent at all is required for the crime of DWI. Unless the statute expressly provides for a mental state, none is required

and accomplishment of the act in question is a sufficient basis for imposing criminal liability. There is no longer, under Arizona law, any degree of innocence which will exculpate a person charged with the aforementioned vehicular crimes.

THE LEGISLATIVE ATTEMPTS
DESIGNED TO PREVENT SUCH
UNCONSTITUTIONALLY OVERBREADTH
ARE UNCONSTITUTIONALLY VAGUE

A. Applicability of New Criminal Code.

The full text of A.R.S. Section 13-102 quoted above is as follows:

"Except as otherwise provided or unless the context otherwise requires, the provisions of this title shall govern the construction of and punishment for any offense defined outside this title."

First, counsel has been unable to uncover any general exception of inapplicability of Title 13 to Title 28. This brief will assume that none exists.

This leaves only the exclusionary language "unless the context otherwise requires." Thus, strict liability exists "unless the context otherwise requires."

Does this mean that an individual judge may determine that some violations of the aforementioned statutes are strict liability offenses and others are not? Does a judge have discretion to impose strict liability in all cases if he sees fit? How does one know when the context "otherwise requires?" Are some Title 28 offenses strict liability offenses now (after years of contrary holdings) and other Title 28 offenses not? What standards are there for determining when the context "otherwise requires?" All of these questions were posed to the trial court. (Doc on Appeal #6). The court refused to provide any guidance and merely denied the motion. (Doc on Appeal #14).

The lack of any clear-cut answer to any of the above questions renders this statutory scheme unconstitutionally vague. How can the non-lawyer citizen of our community know whether or not he is subject to criminal prosecution in

any given accident situation when the answer rests upon whether or not the "context otherwise requires?"

If this court holds that, in all cases, Title 13 does not apply to Title 28 (that is—"the context otherwise requires" in all cases), there is still no mental intent requirement contained in A.R.S. Section 28-701(A). Therefore, the statute is still one of strict liability. (This problem did not exist prior to the New Criminal Code due to the lack of any doubt as to the applicability of Title 13.)

B. Applicability of Strict Liability

The full text of A.R.S. Section 13-202 quoted above also contains some loose language which, perhaps, is designed to prevent the overbreadth problem presented in this brief:

" . . . the offense is one of strict liability unless the proscribed conduct necessarily involves a culpable mental state." (Emphasis supplied.)

The same problems occur with this language; i.e. in whose opinion is a culpable mental state necessarily involved? Are judges to become legislators involving each and every Title 28 offense: How is a reasonable man to know what offenses will be excepted by any particular judge?

In the case at bar, Appellant introduced evidence which tended to show that he was a heart patient who took regular medication for this condition. (R.T. pp. 297-298) He also introduced evidence tending to show that he was, at the time, undergoing severe stress over marital difficulties which had affected his sleep. (R.T. pp. 296-297, 299-399). This, in turn, had resulted in chest pains and an increased intake of the heart medication. (R.T. p. 302). The defense attempted to establish that side-effects of prescription medication taken by the defendant included symptoms which would be mistaken for intoxication:

The defense evidence showed that Appellant had consumed substantially fewer alcoholic-content drinks than indicated by the State's breath-testing device.

(R.T. p. 313). Expert testimony was received in evidence designed to prove, inter alia, that the State's breath-testing devices could have been influenced by the prescription medications as well as by any alcoholic breath measured by the machine giving an erroneously high reading. (R.T. pp. 269-291).

Clearly a jury could have found that the Defendant was not under the influence of alcohol based upon this evidence. Furthermore, the jury could have determined that the Defendant was not negligent in consuming drinks they found he had actually consumed.

Yet, all of this was foreclosed by the trial court's refusal to find any mental element at all in connection with this D.W.L prosecution. In fact, the trial jury was instructed as follows:

"If the Defendant was in such a physical condition that he thereby was more susceptible to the influence of intoxicating liquor than he otherwise would have been, and by reason thereof was under the influence from the recent use of alcoholic liquor, he would be in the same position as though his being under the influence was produced by the alcoholic liquor alone." (R.T. p. 341).

Without mens rea, a citizen who is or becomes tired, sleepy, or ill is strictly liable after only a single drink—or less!! In fact, the State argued just that very point! (R.T. P. 334). An unexpected allergy or other reaction to alcohol makes a criminal out of an otherwise totally blameless citizen.

State v. Porras, 125 Ariz. 490, 610 P.2d 1051 (1980) is an excellent example of a strict liability Title 28 offense. There, although Section 28-661 did not provide for an express mental state in a hit-and-run with injuries offense, the court "read into" the statute the minimum requirement of "knowingly" or "having reason to know" that the accident caused injuries. Indeed, so adamant was the court about this minimum mens rea requirement that one year later it reversed a conviction for Section 28-661 by holding that it was fundamental error to fail to instruct the jury on the defendant's knowledge or anticipation

of the victim's injury. State v. Blevins, 128 Ariz. 68, 623 P.2d 853 (1981). Appellant submits that a minimum mens rea requirement is similarly "fundamental" to the D.W.I. statute.

It seems that, although the statutes have not expressly provided for it, in some cases courts will supply a minimum state necessary to fulfill their own interpretation of the statute. It was not done in this case and Appellant submits it will never be done without appellate guidance on the subject. Even so, while this may be satisfactory for those few traffic appeals reaching past the Superior Court, it hardly provides much guidance to the average non-lawyer citizen faced with conforming his conduct to the ever changing varieties of judicial temperament.

"This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea (citations omitted) because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus or may be viable, the statute is little more than 'a trap for those who act in good faith'." Colautti v. Franklin, 439 U.S. 379 (1979).

The current DWI statute, imposing strict liability as it does, admits of no defense other than the act itself was not done. Involuntary intoxication such as an accidental overdose of prescribed medicines, or "spiking" of someone's punch, followed by driving, would be sufficient for conviction. If the court in Porras was willing to introduce the requirement of "knowingly" despite the language of Section 28-661 and the mandate of Section 13-202(b), then other traffic offenses are equally amenable to court-imposed modification. Just as logically, if certain criminal statutes are to undergo redefinition by the judiciary in order to supply what it thinks is the appropriate mental state, then all suffer from impermissible vagueness in their initial construction. And, to the extent that the courts endeavor to "graft on" appropriate mental states to criminal

statutes, they run afoul of the proscription against common-law criminal offenses contained in A.R.S. Section 13-103.

Another stumbling block to the constitutionality of A.R.S. Section 28-692, assuming permissible interpretation of an appropriate mental state, is which of the four degrees of scienter ("intentional", "recklessly", "knowingly", or "negligently") contained in A.R.S. Section 13-105 would a reasonable man assume the Legislature intended to apply to the offenses charged against this Defendant. This legislative failure to so indicate leaves this Title 28 offense subject to widely disparate application due to its inherent vagueness.

"We start with the familiar proposition that the existence of a mens rea is the rule of, rather than the exception to, the principles of anglo-american criminal jurisprudence. (Citations omitted). . . While strict liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements (citations omitted), the limited circumstances in which Congress has created and this court has recognized such offenses (citations omitted), attest to their generally disfavored status. (Citations omitted) Certainly more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." United States v. United States Gypsum Company, 438 U.S. 422 (1978).

In summary, the crime of D.W.I. (driving while under the influence) encompasses much broader spectrum of conduct than it did in pre-1927 days. Safe, careful and skillful operation of a motor vehicle is not defense. Hasten, supra.

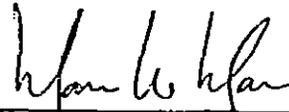
In fact, the crime is broader now than it was in pre-1972 days since the presumptive level of intoxication has now been lowered by the legislature. The legislative presumptions defining intoxication in terms of blood chemistry hardly gives the common man (who has no access to breath-testing devices) any objective basis to know when his conduct passes from the realm of acceptable behavior to that of criminal behavior. Public information on the subject is confusing and misleading.

ONLY ONE FACTOR SAVES THIS STATUTE FROM UNCONSTITUTIONAL VAGUENESS AND OVERBREADTH!!—That one factor is a culpable mental state and the Arizona legislature dispensed with that requirement in 1978 with the adoption of the new criminal code.

CONCLUSION

Appellant respectfully requests that his conviction be reversed and that the statute under which he was convicted be declared unconstitutional. In the event that "judicial modification" of the statute is deemed permissible, Appellant alternatively requests a new trial.

Respectfully submitted,



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ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA)	
)	
Appellee,)	1 CA-CR 6709
)	
vs.)	DEPARTMENT A
)	
ROBERT LOUIS BEARD)	MARICOPA County
)	Superior Court
Appellant.)	No. LCA 22837
)	

APPELLEE'S BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

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STATEMENT OF THE CASE

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On January 16th, 1981, the Appellant was arrested and charged in the City of Mesa with the offense of Driving Under The Influence of Intoxicating Liquor in violation of A.R.S. §28-692.A.

Appellant's case was tried to a jury in the Mesa City Court on October 7th and 9th, 1981. The jury returned a verdict of guilty. Pursuant to the jury's guilty verdict the Appellant was sentenced by the City Magistrate to serve one day in jail and to pay a fine of \$250.00.

Appellant appealed his conviction to the Maricopa County Superior Court. On August 19th, 1982, the Honorable Roger Strand entered an order affirming the judgment and sentence of the Mesa City Court.

Appellant subsequently perfected an appeal to this Court pursuant to A.R.S. §22-375. The sole issue on appeal is the validity of A.R.S. §28-692.A, the statute under which Appellant was charged and convicted. Although A.R.S. §28-692 was substantially revised by the State Legislature by Laws 1982, Chapter 234, section 7, A.R.S. §28-692.A was left untouched and remains in full force and effect.

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STATEMENT OF FACTS

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Shortly after 1:00 a.m. on the morning of January 16th, 1981, Officer James Carney of the Mesa Police Department was on routine patrol, driving west on Main Street in Mesa. At that time the officer saw a blue 1981 Chevrolet pickup truck in front of him, also traveling westbound. Officer Carney's attention was drawn to this vehicle because it was weaving drastically back and forth within its lane. (Transcript, p. 75).

Officer Carney began to follow the pickup truck, which soon arrived at the intersection of Main Street and Lindsay Road. The pickup entered the left turn lane at that intersection and stopped in compliance with a red light. The officer stopped directly behind the pickup. When the light turned green the driver of the pickup attempted to turn left onto Lindsay Road, but stalled the vehicle two or three times in the intersection before he was successful in doing so. (T., pp. 78-79). Eventually the pickup completed its turn onto Lindsay Road and began to drive south, with Officer Carney still following.

While it was traveling south on Lindsay the pickup truck drifted slowly from the left lane all the way into the right lane. The driver of the pickup did nothing to signal this movement. (T., p. 80).

Suspecting that the driver of the pickup might be intoxicated, Officer Carney turned on his flashing overhead

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1 lights in order to stop the vehicle. After traveling
2 approximately a quarter of a mile further, the pickup came to a
3 stop blocking the southbound right hand lane near the
4 intersection of Lindsay Road and Broadway Road. (T., p. 82).

5 The driver of the pickup truck was the Appellant,
6 ROBERT LOUIS BEARD. The officer noticed that Mr. Beard had a
7 strong odor of alcohol on his breath and appeared stuporous.
8 (T., p. 85). After Mr. Beard got out of his truck the officer
9 had to support him to keep him from falling down. (T., p. 85).
10 The officer administered a series of field coordination tests,
11 which the Appellant flunked. He was then placed under arrest
12 for Driving Under the Influence of Intoxicating Liquor. At
13 about this time Mr. Beard voluntarily told the officer that he
14 knew he had "had too much to drink." (T., p. 98).

15 After his arrest the Appellant was taken to the Mesa
16 Police station where he submitted to a breath test using an
17 Intoxilyzer machine. The test showed that Mr. Beard's blood
18 alcohol level was .30%. (T., p. 235.) This result was fully
19 twenty one-hundredths of one percent higher than the presumptive
20 level of intoxication established by statute, which is .10%
21 blood alcohol. (At that time, A.R.S. §28-692.B3; the statute
22 has since been renumbered as A.R.S. §28-692.E3.)

23 Among several motions filed by Appellant's counsel
24 prior to his trial was a Motion to Dismiss alleging the
25 unconstitutionality of A.R.S. §28-692.A. This motion was denied
26 by the trial court.

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The Appellant's case was tried in the Mesa City Court on October 7th and 9th, 1981. The major thrust of Mr. Beard's defense was an attempt to convince the jury that his obvious physical impairment was due to causes other than alcoholic intoxication and that his high breath test result was caused by a heart medicine in his bloodstream which the Intoxilyzer machine mistook for alcohol. After having deliberated for less than a half hour, the jury found the Appellant guilty of Driving Under the Influence of Intoxicating Liquor.

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ARGUMENT

1
2
3 I. IT IS CONSTITUTIONALLY PERMISSIBLE FOR THE LEGISLATURE TO
4 MAKE DRIVING UNDER THE INFLUENCE A STRICT LIABILITY OFFENSE

5 The Appellant's Brief asserts that A.R.S. §28-692.A is
6 unconstitutional for several different reasons. Implicit in all
7 of the Appellant's arguments, however, is the the proposition
8 that the law against driving under the influence cannot be
9 validly enforced unless the offense is deemed to include an
10 element of criminal intent.

11 Under common law all crimes were held to include some
12 degree of scienter, or, in other words, a "guilty mind". In the
13 modern era, however, it is taken for granted that the
14 legislative branch has the power to define crimes which do not
15 include an intent element, so long as the legislature's intent
16 to do so is clear and its action is rationally related to a
17 legitimate state objective. The enactment and enforcement of
18 such "strict liability" criminal statutes is constitutionally
19 permissible. Chicago B. and Q. Railway Co. v. United States 220
20 US 559, 31 S. Ct. 612 (1911); U.S. v. Balint 258 US 250, 42 S.
21 Ct. 301 (1922); Borderland Construction v. State 49 Az. 523, 68
22 P2nd 207 (Sup. Ct., 1937); Fitzpatrick v. Bd. of Medical
23 Examiners 96 Az. 309, 394 P2d 423 (Sup. Ct., 1964); State v.
24 Scofield 7 Az. App. 307, 438 P2nd 776 (1968). The issue of
25 whether or not a particular criminal statute creates a strict
26 liability offense is therefore a question of the legislature's
27 intent. Balint, supra.; Troutner v. State 17 Az. 506, 154 P.

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1 1048 (Sup. Ct., 1916); State v. Cutshaw 7 Az. App. 210, 437 P2nd
2 962 (1968).

3 The courts have further recognized that the
4 legislature's omission of an intent requirement is particularly
5 rational and valid if the offense in question is capable of
6 inflicting widespread injury or creates a public danger the
7 gravity of which is not effected by the violator's state of
8 mind. U. S. v. Dotterweich 320 US 277, 64 S. Ct. 134 (1943);
9 Morissette v. U.S. 342 US 246, 72 S. Ct. 240 (1952); U.S. v.
10 Greenbaum 138 F2nd 437 (3rd Cir., 1943). Surely driving under
11 the influence of liquor, a crime which involves the deaths of
12 thousands of victims and violators every year, would fall into
13 this category.

14 A.R.S. §28-692.A reads as follows:

15 It is unlawful and punishable as provided in
16 §28-692.01 for any person who is under the influence
17 of intoxicating liquor to drive or be in actual
18 physical control of any vehicle within this state.

19 There can be no doubt that the Arizona Legislature
20 intended the crime of Driving Under the Influence of
21 Intoxicating Liquor to be a strict liability offense. A.R.S.
22 §13-202.B explicitly provides that:

23 If a statute defining an offense does not
24 expressly prescribe a culpable mental state that
25 is sufficient for commission of the offense, no
26 culpable mental state is required for the commission
27 of such offense, and the offense is one of strict
28 liability unless the proscribed conduct necessarily
involves a culpable mental state. If the offense
is one of strict liability, proof of a culpable
mental state will also suffice to establish
criminal responsibility.

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1 A.R.S. §13-202.B is made applicable to the construction of
2 offenses defined outside of Title 13 by A.R.S. §13-102.D.
3 Because A.R.S. §28-692.A "does not expressly prescribe a
4 culpable mental state" it is a strict liability crime. (Of
5 course no person could be lawfully convicted of a violation of
6 A.R.S. §28-692.A if his act was a result of duress or coercion.
7 A.R.S. §13-201 provides that the minimum requirement for
8 criminal liability in Arizona is voluntary conduct or a
9 voluntary omission.)

10 A review of the Arizona case law relating to the crime
11 of driving under the influence shows that the courts have
12 recognized for many years that the Legislature intended D.W.I.
13 to be a strict liability offense. In Hasten v. State 35 Az.
14 427, 280 P. 670 (1929), the Supreme Court declared:

15 "With the increasing number and speed of
16 automobiles on our highways, and the appalling
17 number of accidents resulting therefrom, it
18 is not strange that the lawmaking power
19 determined that any person, who of his own free
20 will voluntarily lessened in the slightest degree
21 his ability to handle such vehicles by the
22 use of intoxicating liquor, should, while in
23 such condition, be debarred from their use."
24 35 Az. at 431.

25 And in Weston v. State 49 Az. 183, 65 P2nd 652 (1937), the Court
26 said:

27 "This statute is a police regulation and
28 the purpose of the legislature in passing it
was undoubtedly to make it an offense for any-
one to drive a motor vehicle while under the
influence of intoxicating liquor and, due to
the fact that driving an automobile under these
circumstances is such a menace to public safety,
it intended to penalize anyone guilty of doing
so regardless of how slight that influence might
be." 49 Az. at 186.

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1 II. A.R.S. §28-692.A IS NOT UNCONSTITUTIONALLY VAGUE

2 Under both the United States and Arizona Constitutions
3 a criminal statute is not enforceable if it is so vague that an
4 average citizen cannot determine what kind of conduct is
5 prohibited by the statute. This doctrine was described by the
6 United States Supreme Court in U.S. v. Harriss 347 US 612, 74 S.
7 Ct. 808 (1954):

8 "The constitutional requirement of definiteness
9 is violated by a criminal statute that fails to
10 give a person of ordinary intelligence fair notice
11 that his contemplated conduct is forbidden by the
12 statute. The underlying principle is that no
13 man shall be held criminally responsible for con-
14 duct which he could not reasonably understand
15 to be proscribed." 74 S. Ct. at 812.

16 Appellant's argument to the effect that the D.W.I. law
17 is unconstitutionally vague is not a novel one. An identical
18 claim was dealt with by the Arizona Supreme Court as long ago as
19 1937, in the case of Weston v. State 49 Az. 183, 65 P2nd 652.
20 At that time the drunk driving statute read, in pertinent part:

21 "Any person under the influence of intoxicating
22 liquor or narcotic drugs, . . . who shall drive
23 any vehicle upon any highway within this state,
24 shall be guilty of a misdemeanor, . . ."

25 The appellant in Weston attacked the D.W.I. law on the
26 ground that it was "so vague, uncertain, incomprehensible and
27 not defined that it cannot form the basis of a criminal
28 complaint". 49 Az. at 185. The Court dealt with Weston's
vagueness challenge as follows:

29 "The legislature employed the expression,
30 'under the influence of intoxicating liquor' in
31 the sense in which the public had understood and
32 used it long before this statute was passed, and,
33 according to the holding in Welch v. State, 43

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1 Okl. Cr. 47, 277 Pac. 280, it requires no de-
2 finition or explanation. In State v. Graham,
3 176 Minn. 164, 222 N. W. 909, 911, the court
4 said that it is in common, everyday use by the
5 people, is older than the law in which it
6 appears, and when used in reference to the
7 driver of a vehicle on the public highways
8 appears to have a well understood meaning,
9 which it describes in this language: 'When
10 a person is so affected by intoxicating liquor
11 as not to possess that clearness of intellect
12 and control of himself that he otherwise
13 would have, he is under the influence of
14 intoxicating liquor.'" 49 Az. at 186-187.

15 * * * *

16 "Inasmuch, therefore, as this expression has
17 the meaning attributed to it by this and other
18 courts, and that meaning is one commonly under-
19 stood, there is no reason why, when advising a
20 person in a complaint or information of the
21 nature and cause of the accusation against him,
22 anything indicating more specifically the extent
23 to which he was under such influence should be
24 added to it. The language itself implies that
25 he was affected in such a degree that he did
26 not possess that clearness of intellect and
27 control of himself that he otherwise would have
28 had, and, this being true, it is not apparent
how anyone against whom such a charge is filed
could fail to understand the nature and cause
thereof merely because the words, 'in a per-
ceptible degree', or others of like import, did
not appear after the words, 'intoxicating liquor'.
Treated, therefore, as conveying the meaning
pointed out, as it properly should be, it is
clear that it does not render the statute in-
definite but that it complies with the consti-
tutional requirement it is claimed has been
infringed. Such was the holding in State v.
Graham, supra, when it used this language:

'In that light the use of the expression
in the statute renders the law neither obscure
nor uncertain. We hold the statute to be
constitutional and valid.'

The contention that it authorizes the con-
viction of a person who has taken only one
drink, even though that drink did not perceptibly
affect him or cause him to act any differently
than he would have acted had he not taken it,

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1 is without basis, for the reason that whether
2 one was under the influence of intoxicating liquor
3 within the meaning of this statute depends not
4 upon the number of drinks he has taken but on
5 whether those he did take affected him sufficiently
6 to bring him within its purview." 49 Az. at 187-
7 188.

8 Counsel for the Appellant in the instant case contends
9 that A.R.S. §28-692.A would be saved from its alleged vagueness
10 problems if the crime was interpreted to include an intent
11 element. At the bottom of page 8 of his Brief, referring to the
12 state of the law prior to 1978, he writes:

13 "Thus, criminal liability did not attach
14 until a driver was criminally negligent (and,
15 hence, morally culpable) in allowing his blood
16 alcohol levels to exceed the point where 'sobriety
17 ended and insobriety began.' The difficulty of a
18 common man in determining the exact point of affectation
19 where sobriety became insobriety is not so important
20 when he must be, at least, 'reckless' or 'negligent'
21 in an 'aggravated' manner in failing to perceive
22 the point of debarkation. Clearly, the pre-1978
23 mens rea requirements of Arizona Statutes protected
24 D.W.I. legislation from constitutional vagueness
25 and overbreadth problems."

26 There are two basic fallacies involved in Appellant's
27 arguments on this point. To begin with, if, as Appellant
28 contends, A.R.S. §28-692.A is so vague as to not give a citizen
of ordinary intelligence fair notice of what kind of conduct it
prohibits, how does it help the citizen to tell him that he must
be "morally culpable" in the commission of the act? To graft on
a concept of moral culpability seems only to increase the
potential for vagueness, not reduce it. Secondly, as was
discussed in the first section of this Brief, the State
Legislature clearly intended D.W.I. to be a strict liability

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1 crime to which the mental state of the violator is irrelevant.
2 Any vagueness inquiry, therefore, must focus on the definition
3 of the act in question. In addressing that issue the Court in
4 Weston, supra., concluded that Arizona's D.W.I. law is not
5 unconstitutionally vague.

6 The Appellant further contends that the D.W.I. statute
7 is rendered vague by the fact that the Legislature has specified
8 a particular blood alcohol level at which a person shall be
9 presumed to be intoxicated. See A.R.S. §28-692.E3, formerly
10 A.R.S. §28-692.B3. Appellant argues that a person of ordinary
11 intelligence and education is not equipped to determine when his
12 blood alcohol level has reached the point of presumptive
13 intoxication, and thus lacks fair notice of the conditions under
14 which his conduct will constitute a crime.

15 A similar argument was dealt with by the New York Court
16 of Appeals (that state's highest court) in People v. Cruz 423
17 NYS2nd 625, 399 NE2nd 513 (1979). In that case the lower
18 appellate courts had found New York's dual offenses of "driving
19 while impaired by alcohol" and "driving while intoxicated" to be
20 unconstitutionally vague as applied to a driver who had refused
21 to submit to a test to determine the percentage of alcohol in
22 his blood. The Court of Appeals summed up the lower courts'
23 position as follows:

24 "The lower courts felt that this case disclosed
25 a gap in the legislative scheme. They held that
26 the Legislature had neglected to define impairment
27 or intoxication, except in relationship to the
28 alcoholic content of the blood. Thus they con-
cluded that in cases where no test results are
available there are no definite standards to

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1 guide the defendant, the police, or the courts in
2 determining whether driving after consuming some
3 alcohol would violate the statute and, if so, to
4 what degree." 399 NE2nd at 515-516.

5 The Court of Appeals rejected the idea that either of the
6 statutes in question was unconstitutionally vague. The Court
7 found that both statutes gave adequate notice of the conduct
8 they prohibited without reference to the presumptive blood
9 alcohol levels found elsewhere in the state's law. Referring to
10 the "driving while intoxicated" offense, the Court said:

11 "Although the Legislature did not include
12 a definition of intoxication in the statute,
13 it does not follow that the term is without a
14 definite or ascertainable meaning. Intoxi-
15 cation is not an unfamiliar concept. It is
16 intelligible to the average person (Richard-
17 son, Evidence, §364, pp. 332-333). It is
18 familiar to the law and has long been held
19 to mean an incapacity to perform various
20 mental or physical acts which an average
21 person would be able to do.

22 * * * *

23 In sum, intoxication is a greater degree
24 of impairment which is reached when the
25 driver has voluntarily consumed alcohol to
26 the extent that he is incapable of employing
27 the physical and mental abilities which he is
28 expected to possess in order to operate a
vehicle as a reasonable and prudent driver.

As noted, the concept of intoxication does
not require expert opinion. A layman, in-
cluding the defendant and those charged with
administering the law, should be able to
determine whether the defendant's consumption
of alcohol has rendered him incapable of
operating a motor vehicle as he should."
399 NE2nd at 517.

In an Arizona context, a layman should be able to
determine when he has consumed enough alcohol so as "not to

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1 possess that clearness of intellect and control of himself" when
2 driving that he otherwise would have. This is the common and
3 well understood meaning of the phrase "under the influence of
4 intoxicating liquor" when used in reference to the driver of a
5 vehicle. Weston, supra. Appellant's contention to the effect
6 that the presumptive blood alcohol levels specified elsewhere in
7 A.R.S. §28-692 render the phrase "driving under the influence"
8 incomprehensible is without merit.

9
10 III. A.R.S. §28-692.A IS NOT THE KIND OF STATUTE WHICH IS
11 SUBJECT TO CHALLENGE FOR "OVERBREADTH"

12 A criminal statute can be attacked as overbroad if it
13 infringes upon activities which are constitutionally protected
14 in addition to activities which the state can legitimately
15 punish. The Appellant has alleged that A.R.S. §28-692.A is
16 unconstitutionally overbroad because no intent element is
17 required for the commission of the offense.

18 A person who has engaged in activity which can be
19 constitutionally prohibited will only have standing to attack
20 the relevant statute as overbroad if the statute could also be
21 construed to prohibit activity which is protected by the First
22 Amendment. In non-First Amendment areas "one to whom
23 application of a statute is constitutional will not be heard to
24 attack the statute on the ground that impliedly it might also be
25 taken as applying to other persons or situations in which its
26 application might be unconstitutional". U.S. v. Raines 362 US
27 17, 80 S. Ct. 519 (1960).
28

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,)	
)	
)	NO. 1 CA-CR 6709
Appellee,)	
)	DEPARTMENT A
vs.)	
)	MARICOPA County
ROBERT LOUIS BEARD,)	Superior Court
)	No. LCA 22837
Appellant.)	

APPELLANT'S REPLY BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED APR - 1 1983

GLEN D. CLARK, CLERK

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At Issue 4-1-83

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<u>Weston v. State</u> 49 Ariz. 183, 65 P.2d 652 (1937)	5

ARGUMENT

BOTH DRINKING AND DRIVING ARE
ACTIVITIES WITHIN THE PALE OF
CONSTITUTIONAL PROTECTION

The final section of Appellee's brief in this matter (Appellee's Brief p. 13) underscores the philosophical indifference of law enforcement to the constitutional claims being advanced in this appeal. In that last section, the State claims, without any citation whatsoever, that neither "driving" nor "drinking" constitute constitutionally protected activity. Therefore, the State argues, that all constitutional analysis relating to over-breadth and vagueness is to be abandoned.

Appellant recognizes that both "drinking" and "driving" are subject to reasonable regulation under the police power of this state. That fact, however, does not dispense with all constitutional scrutiny. It is the right of every citizen to engage in activity which has not been prohibited by lawfully constituted authority. For example, in Mayhue v. City of Plantation, Fla., 375 F.2d 447 (1967), in speaking of the sale of spirituous liquors, the court stated:

"It has been historically and legislatively legitimized and is within the constitutional pale and protection." 375 F.2d at 449.

Likewise in Schechter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136 (1963), the Arizona Supreme Court quoted with approval from Berberian v. Lussier, 13 At.2d 869 (R.L. 1953), as follows:

"The use of the automobile as a necessary adjunct to the earning of a livelihood in modern life requires us in the interest of realism to conclude, that the right to use an automobile on the public highways partakes of the nature of a liberty within the meaning of the constitutional guarantees of which the citizen may not be deprived without due process of law." 93 Ariz. at 280.

Consider, also, the decision in Papachristou v. City of Jacksonville, 405 U.S. 156, 93 S.Ct. 839 (1972). In that case, Margaret Papachristou was arrested and charged with "prowling by auto." In discussing the far-reaching over-breadth of the ordinance involved in that case (and in subsequently striking down that ordinance as unconstitutional), the United States Supreme Court summarized the innocent activities which were included within the broad scope of the offending ordinance as follows:

"The difficulty is that these activities are historically part of the amenities of life as we have known it. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be non-conformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence." 92 S.Ct. at 844.

While "driving" and "drinking" per se may be subject to reasonable regulations, legislative activity in this area clearly affects a most fundamental constitutional freedom; to wit: the freedom of travel and movement. See, Coates v. Cincinnatti, 402 U.S. 611 (1971); Shuttlesworth v. Birmingham, 383 U.S. 87 (1965); Aptheher v. Secretary of State, 378 U.S. 500, 514 (1964); Edwards v. California, 314 U.S. 160, 177 (1941)—concurring opinion by Douglas J.

Freedom of movement is so fundamental that it can be restricted only to further the most compelling state interest. Carol v. United States, 267 U.S. 132, 153-154; People v. Superior Court of Yolo County, 91 Cal.Rptr. 729,

478 P.2d 449, 453 (1970). Any ordinance or statute which attempts to regulate freedom of movement must be so circumscribed as to withstand constitutional challenge. In re Hoffman, 64 Cal.Rptr. 97, 434 P.2d 353, 357-358 (1967); People v. McKelvy, 100 Cal.Rptr. 661 (1972). The challenged statute, as it has existed since 1978, clearly fails to meet these standards for the reasons contained in Appellant's Opening Brief.

SCIENTER IS CONSTITUTIONALLY
REQUIRED WHEN AN AVERAGE CITIZEN
CAN NO LONGER DETERMINE WHEN HIS
CONDUCT MOVES FROM LAWFUL AND
INNOCENT ACTIVITY TO CRIMINALLY
PROHIBITED ACTIVITY

Appellee begins the argument in its answering brief with an assertion that the entirety of Appellant's arguments rest upon the fundamental proposition that the crime of DWI cannot be validly enforced unless the offense includes an element of criminal intent. This rather simplistic view of Appellant's contentions widely misses the mark.

Appellant acknowledges that it is clearly within the power of the State to make certain acts criminal, regardless of the intent with which they are performed. State v. Cutshaw, 7 Ariz. App. 210, 437 P.2d 962 (1968). As noted in Cutshaw, however, there are limits to this legislative power:

"But, there are judicial pronouncements of constitutional limits upon the legislature's power to criminalize acts which completely innocent and well-meaning people may do." 7 Ariz. App. at 221.

Certain types of activity are part of the "amenities of life" referred to in Papachristou, supra, and may not be legitimately prohibited without some element of scienter. For example, in State v. Burrow, 13 Ariz. App. 130, 474 P.2d 849 (1970), it is noted:

"Our Supreme Court has held that in the area of criminal intent, legislative policy fixes two types of crimes, those which require an evil intention and those which the mere doing of the act is criminal, in which case only an intent to do the act is required. These latter acts commonly denominated malum prohibitum, usually involve conduct which so threatens the public that there must be absolute prohibition." 13 Ariz. App. at 132.

Appellant does not question the power of the legislature to determine that drinking and driving is so "life-threatening" as to prohibit the combination absolutely. However, the legislature has not done so. In this State, a person may "drink" and he may "drive." Furthermore, he may lawfully and legitimately do both. These "freedoms" are illusory, however, in that the average citizen has no readily available means of determining when his conduct transgresses into the illegal and prohibited activity which has now been defined in terms of blood chemistry, rather than notions of common understanding and moral culpability.

As long as the legislature purports to allow the combination of "drinking" and "driving" the average citizen is entitled to:

1. A statute defining the line of embarkation between prohibited conduct and non-prohibited conduct; or
2. An element of scienter which gives him reasonable notice of the standard by which he will be judged in determining, for himself, that his conduct has transgressed into prohibited areas.

The State claims an inability to understand how it could help a citizen to tell him that he must be "morally culpable" in the commission of such activity. (Appellee's Answering Brief p. 10). Yet, (on Page 12, Appellee's Answering Brief) Appellee acknowledges that "a layman should be able to determine when he has consume enough alcohol . . .". (Emphasis Supplied). Appellant respectfully submits that the 1978 revisions to the Arizona Criminal Code have so obscured

the point at which "drinking" combined with "driving" become criminal, that this Court must now strike down the statute as unconstitutional.

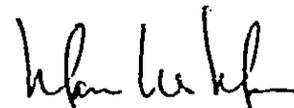
THE POST-1978 DWI STATUTE
IS FUNDAMENTALLY DIFFERENT
THAN ITS PREDECESSOR

Weston v. State, 49 Ariz. 183, 65 P.2d 652 (1937) and Hasten v. State, 35 Ariz. 427, 280 P. 670 (1929), cited by the Appellee as authority for the proposition that the D.W.I. statute has always been a strict liability offense, are simply not applicable. At the time of both decisions, the DWI statute was defined solely in terms of common understanding. Now, however, the statute is defined in terms of blood chemistry. The average citizen has no way of knowing, with any degree of exactitude, when the level of alcohol in his blood reaches the proscribed level. Unless an element of scienter is to be found, the statute suffers from constitutional over-breadth and vagueness.

CONCLUSION

Appellant respectfully requests that the relief requested in his Opening Brief be granted.

Respectfully submitted,



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