IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
GEORGE PETER LYNARD,
Respondent.

No. 45176

FILED

DEC 12 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a State's appeal from a district court order granting respondent's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On June 24, 2001, respondent George Peter Lynard was convicted, pursuant to a jury verdict, of two counts of driving while under the influence of a controlled substance (DUI) causing the death of another. The district court sentenced Lynard to serve two consecutive prison terms of 24 to 240 months. Lynard filed a direct appeal, and this court affirmed the judgment of conviction.[1]

On October 29, 2003, Lynard filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. The district court appointed counsel to represent Lynard. After

[1]Lynard v. State, Docket No. 38401 (Order of Affirmance, November 8, 2002).

conducting an evidentiary hearing and considering supplemental briefs, the district court granted the petition. The State filed this timely appeal.

The State argues that the district court erred by finding that trial counsel was ineffective for failing to present evidence that Lynard had a prescription for marijuana in accordance with California's Compassionate Use Act of 1996.[2] The State argues, among other things, that the district court erred by ruling that possessing a letter from a California doctor recommending marijuana use is a defense to Nevada criminal charges of DUI causing death. We agree.

First, the letter recommending marijuana use was not a defense to the DUI counts charged pursuant to NRS 484.3795(1)(f), the per se theory. To prove the crime of DUI causing death under a per se theory, the State must prove that the defendant was in actual physical control of a vehicle with a specified level of "prohibited substance" in his blood and proximately caused the death of another.[3] A prohibited substance is expressly defined in NRS 484.1245(5) to include marijuana and marijuana metabolite provided "the person who uses the substance has not been issued a valid prescription to use the substance."[4]

---

[2]Cal. Health & Safety Code § 11362.5 (2006).

[3]NRS 484.3795(1)(f); NRS 484.379(3).

[4]NRS 484.1245(5); see also NRS 484.379(3).

Under California law, however, the letter is not a "valid prescription." The California Code requires that prescriptions for a controlled substance must state "the name and quantity of the drug or device prescribed and the directions for use."[5] Here, the letter recommending marijuana use has none of the indicia of a valid California prescription for a controlled substance. It does not mention the potency or quantity of the drug that Lynard is to use, and it does not contain warnings or directions for use. Moreover, the fact that the recommendation was made pursuant to California's Compassionate Use Act does not mean that the letter is a valid out-of-state prescription.[6] The letter simply does not satisfy California's legal definition of a valid prescription for a controlled substance because it does not include sufficient directives for use.[7]

---

[5]Cal. Bus. & Prof. Code § 4040 (1998); see also Cal. Health & Safety Code § 11164 (2006). These California provisions have remained substantially unchanged since 1999.

[6]See NRS 639.235(1) ("a prescription written by a person who is not licensed to practice in this state, but is authorized by the laws of another state to prescribe, shall be deemed to be a legal prescription").

[7]See 1991 Cal. Legis. Serv. Ch. 592 (West); Cal. Health & Safety Code § 11164 (1999). We further note that even a valid prescription does not provide a California medical marijuana user with a defense to DUI in California. See 1998 Cal. Legis. Serv. Ch. 118, § 84 (West); Cal. Veh. Code § 23630 (1999) ("The fact that any person charged with [DUI] . . . is, or has been entitled to use, the drug under the laws of this state shall not constitute a defense against any violation of the [DUI laws]."); People v. Mower, 49 P.3d 1067, 1076-77 (Cal. 2002) (possessing a recommendation to use marijuana from a doctor provides an affirmative defense only to the criminal charges of possession and cultivation of marijuana).

Second, the letter recommending marijuana use was not a defense to the DUI counts charged under NRS 484.3795(1)(c), the impairment theory. To prove DUI causing death under an impairment theory, the State must prove that a person was under the influence of a controlled substance to a degree that rendered him incapable of safely driving a vehicle and that the act of unsafe driving proximately caused the death of another.[8] Notably, there is no language in NRS 484.3795(1)(c) providing an exception or possible defense for impaired drivers who have a valid prescription for a controlled substance. Thus, the fact that Lynard may have legally ingested marijuana in California before the accident was irrelevant to the DUI counts charged under an impairment theory.[9]

---

[8]See NRS 484.3795(1)(c); Cotter v. State, 103 Nev. 303, 738 P.2d 506 (1987).

[9]Lynard also argues that the guilty verdicts on the impairment counts are attributable to "spillover prejudice" arising from defense counsel's failure to present evidence that he legally ingested marijuana in California as a defense to the DUI counts charged under the per se theory. Assuming that the trial court would have allowed such a defense, we disagree that the guilty verdicts on the DUI counts charged under the impairment theory were the result of some form of spillover effect. At trial, the State presented sufficient evidence from which the jury could infer impairment, including evidence that Lynard's THC level indicated that he had ingested marijuana within the last twelve hours and had caused the accident by driving on the wrong side of the road. Additionally, the State presented evidence that in the two day time period before the accident Lynard was sleep-deprived: he attended a concert in California, slept for a few hours in the back of a pick-up truck, and then drove to Nevada and stayed awake all night gambling at a local casino. See U.S. v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987) (discussing spillover prejudice analysis).

Accordingly, we conclude that the district court erred in ruling that defense counsel was ineffective under the standard set forth in Strickland v. Washington.[10] The letter was not a valid out-of-state prescription. Thus, defense counsel's failure to present it to the jury did not fall below an objective standard of reasonableness because it would have provided no defense to the charged DUI crimes. For the same reason, Lynard failed to establish prejudice; introduction of the letter into evidence would not have affected the outcome of the trial.

For the first time in this appeal, Lynard also argues that his defense counsel was ineffective for: (1) misadvising him that he had a defense, resulting in the rejection of a favorable plea offer from the State; (2) failing to present a medical necessity defense; (3) failing to challenge an erroneous jury instruction defining DUI;[11] and (4) failing to present evidence that he had the prescription at the sentencing hearing. We decline to consider these allegations because they were not raised in the post-conviction petition or considered by the district court.[12]

Having considered the State's arguments and concluded that the district court erred in granting the writ, we

---

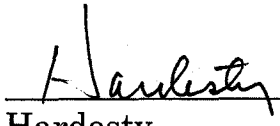
[10]466 U.S. 668 (1984).

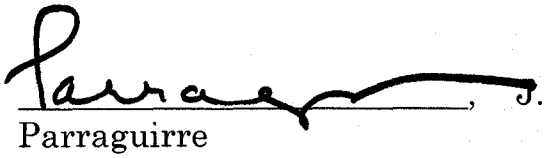
[11]We also reject Lynard's allegation that the erroneous jury instruction defining the impairment theory of DUI resulted in plain error of constitutional magnitude.

[12]See Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[13]


_____, J.
Becker


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Scott W. Edwards
Washoe District Court Clerk

---

[13]We vacate the stay previously imposed by this court on June 29, 2005.