Legal Brief Bank

LOVE V. GEORGIA

*Web limitations necessitate location of footnotes at end of brief.

IN THE SUPREME COURT
STATE OF GEORGIA

* * *

Case No. S99 A 0509

EVERETTE BRYAN LOVE v. THE STATE OF GEORGIA

* * *

BRIEF OF APPELLANT
EVERETTE BRYAN LOVE

David E. Clark, State Bar number 126660
Jessica R. Towne, State Bar number 714915
Attorneys for Appellant

Clark & Towne, P.C.
584 South Perry Street
Suite 200
Lawrenceville, Georgia 30245
(770) 338-2338
Facsimile (770) 338-2341
E-mail ClarkTowne@mindspring.com

IN THE SUPREME COURT
STATE OF GEORGIA

EVERETTE BRYAN LOVE, Appellant v. THE STATE OF GEORGIA, Appellee.	Appeal No. **S99A0509** From Gwinnett State Court Case Number 96D-5016-1 Judge Mock

Judge Mock

BRIEF OF APPELLANT

JUDGMENT APPEALED

Appellant was convicted of Driving with Unlawful Drugs Present in Blood or Urine (O.C.G.A. §40-6-391(a)(6)) on November 19, 1997 after a jury trial. He appeals from the Order of the Gwinnett State Court dated October 1, 1996 and filed October 2, 1996 in case number 96D-3500-1. (Record, index number 17, page 101)

JURISDICTIONAL STATEMENT

The appellant attacks the constitutionality of O.C.G.A. §40-6-391 (a)(6) as applied to him. This court has exclusive jurisdiction to hear appeals involving the constitutionality of a statute. Ga. Const. Art VI, Sec. VI, Para. II (1). Appellant preserved his right to do so by raising the constitutional attack in a timely written demurrer to the accusation. (R.)

STATEMENT OF FACTS

On May 31, 1996, Appellant Everette "Bryan" Love was driving on Interstate 85 in Gwinnett County and was stopped for speeding. After an investigative detention, the arresting officer concluded that there was probable cause to arrest Love for driving under the influence based on the odor of marijuana he smelled upon approaching Love's car. Love was charged with speeding, possession of marijuana less than one ounce, and driving under the influence of drugs (O.C.G.A. §40-6-391 (a)(2)).

Love later submitted to chemical testing as required by the implied consent law. Samples of his urine and blood were taken and sent to the GBI Crime Lab. Two immunoassay screening tests were run on his urine and two on his blood. The results indicated the presence of marijuana metabolites[1] in both cases.

A more precise quantitative test was then run on the blood sample, using gas chromatography / mass spectrometry techniques. The result showed a level of "cannabinoids" in the blood sample of between 25-50 nanograms per milliliter (µgr/ml). Love was subsequently charged with Driving with Unlawful Drugs Present in Blood or Urine (O.C.G.A. §40-6-391(a)(6)).

At trial, the State chose only to prosecute Love for the two DUI counts. The jury was unable to reach a verdict on Count I, Driving Under the Influence of Drugs, but found Love guilty on Count II, Driving with Unlawful Drugs in Blood or Urine.

ENUMERATION OF ERRORS

The trial court should have granted Appellant's demurrer and quashed Count II of the accusation

for the following reasons:

(1) O.C.G.A. §40-6-391 violates the equal protection clause of the United States Constitution and Article 1, Section 1, Paragraph 2 of the Constitution of Georgia by unreasonably discriminating against sober drivers with low levels of marijuana metabolites in the blood.

(2) O.C.G.A. §40-6-391 violates the equal protection clause of the United States Constitution and Article 1, Section 1, Paragraph 2 of the Constitution of Georgia by arbitrarily discriminating against non-prescription marijuana users.

(3) O.C.G.A. §40-6-391 violates substantive due process guarantees contained in the United States Constitution, Amendment V, and Article 1, Section 1, Paragraph 1 of the Constitution of Georgia because, considering the interests of both the public and of the individual defendant, there are other, less onerous means by which the public interests might be protected.

ARGUMENT AND CITATIONS TO AUTHORITY

The jury could not find that Bryan Love was an unsafe driver due to marijuana impairment and was hung on Count I. The fact that they were required to then find this sober driver guilty of DUI under §40-6-391(a)(6) law exposes its fundamental arbitrariness and tendency toward injustice.

I. EQUAL PROTECTION

A. The Requirements of an Equal Protection Attack.

The United States Constitution states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” United States Const. Amend XIV, §1. The Georgia Constitution similarly provides: “Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.” Ga. Const. Art. 1, Sec. 1, Para. 2. It has been held that these provisions are substantially equivalent and coextensive. Rucks v. State, 201 Ga.App. 142, 410 S.E.2d 206 (1991).2

A criminal statute violates equal protection if it treats similarly situated persons differently for reasons not rationally related to the purpose of the statute. Reed v. State, 264 Ga. 466, 448 S.E.2d 189 (1994). “There are two prongs to an evaluation of legislation under an equal protection claim ... and, as the legislation is presumptively valid, the claimant has the burden of proof as to both prongs. Initially, the claimant must establish that he is similarly situated to members of the class who are treated differently from him. Next, the claimant must establish that there is no rational basis for such different treatment. [Cit.]" Dobbins v. State, 262 Ga. 161(1), 415 S.E.2d 168 (1992). “Where groups are similarly situated ‘[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.’ City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (105 SCt 3249, 3254, 87 LEd2d 313) (1985); Price v. Tanner, 855 F.2d 820, 822-23 (11th Cir.1988).” Stuart-James Co., Inc. v. Tanner, 259 Ga. 289, 380 S.E.2d 257 (1989).

The equal protection clause prohibits state legislation imposing criminal penalties upon a class of persons based on criteria that do not further the purpose of the statute. Bickford v. Nolen, 240 Ga. 255, 256, 240 S.E.2d 24 (1977). Such arbitrary discrimination denies the affected class the equal protection of the laws.

B. O.C.G.A. §40-6-391(a)(6) Violates the Equal Protection Clause by Arbitrarily Classifying Drivers with Low Levels of Residual Marijuana in their Blood or Urine as DUI.

DUI under subsection (a)(6) of O.C.G.A. §40-6-3913 is a strict liability offense. One positive drug screen from the night of the arrest is enough to support a conviction.

The problem is that the presence of low levels of marijuana or its metabolites in a driver's blood or urine does not indicate driving impairment or intoxication. The statute operates unconstitutionally against drivers with low levels of marijuana residue in their blood who are no longer under the influence of the drug. According to the evidence and the jury's verdict, Appellant was in that class when he was arrested.

Controlled scientific studies have proven that the presence of marijuana metabolites in the blood is meaningless in terms of determining driving impairment. "It is not possible to conclude anything about a driver's impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample." Marijuana and Actual Driving Performance, Effects of THC on Driving Performance, U.S. Department of Transportation, National Highway Traffic Safety Administration, DOT HS 808 078 (November 1993), p.6.4

At the pretrial motion hearing on Appellant's demurrer, the State's expert witness, Dr. Horton McCurdy, and the defense expert, Dr. John Holbrook, corroborated this DOT study. Both testified that the statutory method of imposing strict liability for DUI based on a positive immunoassay screen for marijuana produces "arbitrary" results. (Motions transcript, pages 63, 85) The objective of Georgia's DUI statute, O.C.G.A. §40-6-391, is traffic safety.5 If a positive urine or blood test for marijuana residue does not indicate that the driver is a threat to traffic safety, then classification and punishment of such drivers does not further the purpose of traffic safety and is unlawfully arbitrary under Bickford v. Nolen, supra.

The inability to link driving impairment to the presence of marijuana in the blood is due to the pharmacokinetics of marijuana. Marijuana produces noticeable effects for one to five hours after it is smoked because of Tetrahydrocannabinol (THC), its active ingredient.6 These effects peak during the first hour and rapidly decline to 5 - 10% of the peak level. The metabolism and elimination of THC is very slow. THC and its metabolites are soluble in fatty tissues and remain there long after the user has stopped feeling the effects of the drug. Once ingested, THC and its metabolites are detectible in the user's blood for several weeks.7

Since the evidence of smoking marijuana remains in the body for such a long time, a positive drug screen within an hour or so of an arrest does not mean that the driver was "high" or under the influence of the drug while driving.8 He might have been high two weeks ago.

Moreover, people do not generally drive poorly while high on marijuana. The DOT study referred to above indicates that marijuana does not impair driving performance at low doses, and in fact enhances driver safety once the effects of the drug are felt by the user.9 Low doses of marijuana have approximately the same effect on driving ability as many non-prescription decongestant

drugs.10 Even at high doses, marijuana does not impair driving ability that much, as compared with alcohol. The study showed that drivers administered the highest dosage of THC showed impairment equivalent to an 0.08% blood alcohol level, below the Georgia "per se" level of 0.10%.11

According to the State's evidence, the level of total "cannabinoids" in Bryan Love's blood was 25 - 50 nanograms per milliliter (µg/ml), the lowest level detectable by the Georgia Crime Lab's equipment.12 Dr. McCurdy testified that the crime lab considers 35 µg/ml to be a negative result.

As a matter of science, it cannot be presumed that Love was impaired in his driving ability on the night of his arrest based on the low levels of cannabinoids discovered by the Crime Lab test. Neither was there other evidence proving him to be unsafe to drive. The jury could not agree that he was a less safe driver and did not convict him on Count I, which required such a finding.

Not all "per se" DUI statutes are unfair: Subsection (a)(5), which creates a conclusive presumption that persons with 0.10% grams blood alcohol are under the influence, is not arbitrary. Persons at that %BAC are almost always too intoxicated to drive. Furthermore, alcohol is metabolized and eliminated quickly (0.015% grams per hour), so there is no danger of detecting alcohol residue in the blood or urine days or weeks after intoxication. The classification and punishment of drivers with a BAC of 0.10% or higher is directly related to traffic safety, the purpose of the DUI law.

There has been no previous equal protection challenge to this statute in our State.13 State v. Phillips, 178 Ariz. 368, 873 P.2d 706 (1994) can be distinguished from the case at bar. Phillips was a methamphetamine / marijuana DUI case. The Court of Appeals of Arizona held that their state's law prohibiting driving with any amount of illegal drugs in the system was rationally related to traffic safety because there was no way to set a meaningful "per se" impairment level.

In the case at bar, both expert witnesses, Drs. McCurdy and Holbrook, had tremendous experience with marijuana and its effects on driving impairment, and testified that driving impairment can be routinely excluded at certain plasma concentrations of marijuana, and routinely presumed at blood concentration levels of 75-100 nanograms per milliliter. Dr. McCurdy talked about "cut-off levels" that he used to segregate obviously unimpaired test subjects. The Appellant in Arizona presented no evidence in this regard. 873 P.2d at 710.

The state's attempt to show that plasma THC levels cannot be quantified simply backfired. Dr. Holbrook was asked on direct, "can the level of cannabinoids in a person's blood be quantified using scientific testing? A: Certainly." (T. 89) Again, by the Solicitor on cross, "Q: Can the amount of marijuana in a person's blood or urine be pinpointed to an exact amount? A: Certainly. Q: It can be? A: Yes." (T. 91) He was also asked whether there was a scientific basis for a "per se" level above which marijuana can be presumed to impair driving, and responded "Yes, I think that there have been some human studies done that pretty well tell us that if you have a level of marijuana in your system of say 75 to 100 [nanograms per milliliter] that you stand a high likelihood of being intoxicated." (T. 92) The DOT study bears out this testimony as being accurate, and provides additional details linking actual blood concentration levels to driving impairment.

The quantitative analysis of Love's blood on the second page of the lab report is purportedly accurate to 25 billionths of a gram per milliliter. The report shows that accurate quantitative

analysis is routinely performed at our own crime lab.

Since a "per se" limit of 75-100 µg/ml is scientifically valid and enforceable in Georgia using equipment we already have, it cannot be intelligently argued that an "any amount" standard is the only workable standard. We know too much about marijuana to pretend that low levels "might be dangerous." Everybody who has studied the subject now knows they are not.

B. O.C.G.A. §40-6-391(b) Violates the Equal Protection Clause by Arbitrarily Changing the Burden of Proof of Guilt for Prescription Marijuana Users.

O.C.G.A. §40-6-391 imposes two different burdens of proof for marijuana-related DUI prosecutions. Drivers who are legally entitled to use marijuana[14] can only be convicted of DUI if they are proven to have driven while under the influence of the drug to the extent that it impaired their ability to drive safely. Drivers who have used non-prescription marijuana are guilty of DUI if they drive, regardless of whether they were under the influence. Appellant Bryan Love is part of the second class of drivers.

Had Bryan Love had the benefit of the "less safe" standard of proof at trial, he would not have been convicted. He was tried under both versions of the DUI law and the jury could not reach a guilty verdict on Count I, "less safe."

The statutory segregation of prescription and non-prescription drug users is not rationally related to traffic safety, the purpose of the DUI law. The statute does not further the cause of traffic safety by giving prescription marijuana users a break at trial. The fact that marijuana is illegal does not have anything to do with traffic safety, which is compromised only when a driver is impaired by alcohol or drugs - any drugs.

Neither can it be said that illegal drugs users as a class are such a grave risk to traffic safety such that they may lawfully be discriminated against in traffic laws whenever possible. The vast majority of DUI-related traffic accidents involve alcohol, some involve both alcohol and drugs, and a small percentage can be attributable solely to illegal drugs alone. There is no safety-related reason to impose liability on illegal drug users for DUI without requiring proof of impairment. It makes about as much sense, in the context of traffic safety, as imposing strict liability for DUI on those who drive after cheating on their taxes.

II. SUBSTANTIVE DUE PROCESS

A criminal statute violates the due process clause where, considering the interests of both the public and of the individual defendant, there are other, less onerous means by which the public interests might be protected. Davis v. City of Peachtree City, 251 Ga. 219, 304 S.E.2d 701 (1983). When this substantive due process analysis is applied to the instant case, subsection (a)(6) of the DUI statute falls short of what is constitutionally required.

The public has absolutely no interest in prosecuting unimpaired drivers for DUI. As shown above, there is no connection between the presence of marijuana metabolites in the blood and impaired driving ability. When applied to persons in Appellant's position, the statute simply acts to deter marjuana consumption by criminalizing tha act of driving within two or three weeks of drugs use. Although it may be in the public interest to deter such drug use, there are better ways to do so

than prosecuting sober drivers for DUI simply because a screening test indicates that they used marijuana at some time in the past.

In opposition to these minimal interests of the public are those of the individual. Persons convicted of DUI face mandatory minimum jail time, fines, community service, onerous conditions of probation, substance abuse evaluation and treatment at their own expense, a one year license suspension, social stigmatization and other assorted economic and occupational disadvantages. Bryan Love's conviction resulted in the imposition of restraints on his rights to liberty, privacy, and free travel even though he was not found to have been a danger to other drivers.15 In truth, he was punished for the "status" of being a drug user.

The "any amount" DUI-drugs law is a very inefficient way to prevent drug impaired driving, and the associated costs are unacceptable. There exists the constant risk of punishing an unimpaired driver for DUI. The "less safe" standard imposed under subsection (a)(2) is much fairer and is effective in protecting the public from drug-impaired drivers.

CONCLUSION

The conviction of Bryan Love was a travesty. A conviction based on "prior crimes" evidence or character evidence would be condemned by this court and swiftly reversed. However, this ridiculous law allowed the jury to convict an unimpaired driver of DUI simply because he had smoked marijuana sometime in the past. The status of being a marijuana smoker instantly made him an impaired driver.

To justify an "any amount" DUI drug law like Arizona's or ours on the basis that a meaningful "per se" level cannot be fixed is an affront to the presumption of innocence. If no per se impairment level can be found, the correct answer is to require the State to prove that the driver was impaired. DUI cases are won every day where the alcohol test is under 0.10% and the State has to prove that the driver was under the influence to the extent that it was less safe for the Defendant to drive. The only fair way to prosecute DUI-drugs cases is under subsection (a)(2).

Flimsy science can no longer be used as an excuse for leaving a law on the books that puts unimpaired drivers in jail for DUI. The State and Defense witnesses agreed on the central flaw in §40-6-391(a)(6), its arbitrariness. Because it arbitrarily and unnecessarily discriminates against sober, unimpaired drivers who happen to have certain inert compounds in their bodies, it violates equal protection. Because this arbitrariness can be eliminated without compromising public safety by prosecuting DUI / drug suspects under §40-6-391(a)(2) and the Controlled Substances Act, the statute offends substantive due process as well.

RESPECTFULLY SUBMITTED this _____day of _____, 1999.

_____
David E. Clark
State Bar Number 126660

_____ Jessica R. Towne

State Bar Number 714915
for the Firm of CLARK & TOWNE, P.C.
Attorneys for Appellant

Clark & Towne, P.C.
584 South Perry Street
Suite 200
Lawrenceville, Georgia 30245
(770) 338-2338
Facsimile (770) 338-2341
E-mail ClarkTowne@mindspring.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served on opposing counsel by facsimile transmission and by depositing same in the U.S. Mail with adequate postage thereon to ensure delivery addressed to:

Assistant Solicitor
Gwinnett State Court
75 Langley Drive
Lawrenceville, GA 30245

This _____ day of _____, 1999.

_____
David E. Clark
State Bar Number 126660

Clark & Towne, P.C.
584 South Perry Street
Suite 200
Lawrenceville, Georgia 30245
(770) 338-2338
Facsimile (770) 338-2341
E-mail ClarkTowne@mindspring.com

FOOTNOTES

1. THC is the ingredient in the marijuana plant that gives it its unique sedative-euphoriant psychedelic properties. The body breaks this active ingredient down into subcompounds called metabolites, the most common being 9-carboxy tetrahydrocannibinol (THC-COOH).

2. The Equal Protection Clause in the Georgia Constitution may, however, be interpreted to offer greater rights than the federal equal protection clause. Grissom v Gleason, 262 Ga. 374, 418 S.E.2d 27 (1992).

3. O.C.G.A. ¤40-6-391 provides: (a) A person shall not drive or be in actual physical control of any moving vehicle while:
(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;
(2) Under the influence of any drug to the extent that it is less safe for the person to drive;
(3) Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;
(4) Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) of this subsection to the extent that it is less safe for the person to drive;
(5) The person's alcohol concentration is 0.10 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended; or
(6) Subject to the provisions of subsection (b) of this Code section, there is *any amount of marijuana* or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.
(b) The fact that any person charged with violating this Code section is or has been *legally entitled* to use a drug shall not constitute a defense against any charge of violating this Code section; provided, however, *that such person shall not be in violation of this Code section unless such person is rendered incapable of driving safely* as a result of using a drug other than alcohol which such person is legally entitled to use.
(c) Every person convicted of violating this Code section shall, upon a first or second conviction thereof, be guilty of a misdemeanor and, upon a third or subsequent conviction thereof, be guilty of a high and aggravated misdemeanor . . ." (Emphasis supplied).

4. This finding was one of the main conclusions of the attached DOT paper. The same language can also be found in a Dutch study: Robbe, H.W.J., *Marijuana's Effects on Actual Driving Performance*, Institute for Human Psychopharmacology, University of Maastricht, Netherlands, (1995). The Australian government published a similar conclusion: "There is no clear relationship between blood levels of THC or its metabolites and the degree of either impairment or subjective intoxication." Hall, Solowij and Lemon, *The Health and Psychological Consequences of Cannabis Use*, National Drug and Alcohol Research Centre (Australia) (1995).

5. The statutory purpose of all the regulations codified as chapter 40-6 is to promulgate the safe and expeditious movement of vehicular traffic on the highways. Crook v. State, 156 Ga. App. 756, 275 S.E.2d 794 (1980).

6. Hall, Solowij and Lemon, supra.

7. Id.

8. "[A] positive urinalysis can indicate either recent use or use that occurred several weeks earlier. Multiple sampling may be necessary to differentiate the results. Thus, a single positive urine test does not mean that a person was under the influence of marijuana at the time the urine

specimen was collected." Julien, Robert M., *A Primer of Drug Action*, 7th ed. (W.H. Freeman, New York 1995), p. 340.

9. The degree of psychomotor impairment is dependent on the dose of THC absorbed by the brain; however, the psychomotor impairment associated with use of marijuana is minimal, and is compensated for when driving, such that the impairment is irrelevant to driving skills. It has been shown that persons intoxicated by marijuana are often safer drivers than they would normally be because of their over-awareness of the effects of the drug. "Drivers under the influence of marijuana retain insight in their performance, and will compensate where they can, for example, by slowing down or increasing effort. As a consequence, THC's adverse effects on driving performance appear relatively small. . . Of the many psychotropic drugs, licit and illicit, that are available and used by people who subsequently drive, marijuana may well be among the least harmful." *Marijuana and Actual Driving Performance*, supra.

10. The NHTSA study shows the effect of "Benadryl" and "Actifed," two common non prescription drugs, to be worse than THC in terms of their effect on road tracking performance. "THC's effects [on driving] are in no way unusual. In so far as its effects on SDLP [standard deviation of lateral position, or maintaining lane], THC was just another moderately impairing drug." Id.

11. The NHTSA study summarized all available comparative studies and concluded that "THC's effects after doses of 300 ug/kg [highest dose] never exceed alcohol's at BACs of 0.08%." Id. The other materials cited herein agree that the range is 0.07 - 0.10%.

12. See attached GBI Crime Lab report.

13. The statute was attacked on vagueness grounds in Steele v State, 260 Ga. 835, 400 S.E.2d 1 (1991).

14. See note 4 on the lawful prescription of marijuana for certain illnesses. O.C.G.A. ¤43 34-126 makes persons holding lawfully prescribed marijuana immune from prosecution under the Controlled Substances Act.

15. Bryan Love was pulled over for speeding, which certainly endangered other drivers; however, subsection (a)(6) must here be analyzed in terms of the public's interest in punishing marijuana users who are otherwise safe drivers.