

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
Clerk of Supreme Court

JUSTIN PATRICK KELLEY,

Appellant,

No. 67777

vs.

THE STATE OF NEVADA,

Respondent.

_____ /

Appeal from a Judgment of Conviction
Fourth Judicial District Court, Elko
The Honorable ALVIN R. KACIN, District Judge

APPELLANT'S FAST TRACK STATEMENT

FREDERICK B. LEE, JR., ESQ.
ELKO COUNTY PUBLIC DEFENDER
569 Court Street
Elko, Nevada 89801
Nevada Bar Number 1257

ADAM LAXALT
ATTORNEY GENERAL
100 N Carson Street
Carson City, Nevada 89701

By: ROGER H. STEWART
CHIEF DEPUTY PUBLIC DEFENDER
ATTORNEY
569 Court Street
Elko, Nevada 89801
Nevada Bar Number 3823

MARK D. TORVINEN
ELKO COUNTY DISTRICT
540 Court Street
Elko, Nevada 89801
Nevada Bar Number 551

Attorneys for Appellant

Attorneys for Respondent

FAST TRACK STATEMENT

1. NAME OF PARTY: JUSTIN PATRICK KELLEY.
2. PARTY'S ATTORNEYS:
By: ROGER H. STEWART
CHIEF DEPUTY ELKO COUNTY PUBLIC DEFENDER
Attorney for Appellant
775-738-2521
3. CHANGE OF COUNSEL: NONE.
4. DISTRICT, COUNTY, AND CASE NUMBER: FOURTH JUDICIAL
DISTRICT, ELKO COUNTY, CASE NO. CR-FP-14-198
5. JUDGE: THE HONORABLE ALVIN R. KACIN
6. TRIAL LENGTH AND TYPE: NO TRIAL; ENTERED PLEA PRESERVING
ISSUE
7. APPEAL FROM: ELUDING A POLICE OFFICER FELONY CONVICTION
8. SENTENCE: TWELVE TO FORTY-EIGHT MONTHS, SUSPENDED
9. SENTENCE ANNOUNCED: MARCH 23, 2015
10. ENTRY OF SENTENCE: MARCH 26, 2015
11. HABEAS CORPUS INFORMATION: NONE
12. POST-JUDGMENT MOTION INFORMATION: NONE
13. NOTICE OF APPEAL: APRIL 8, 2015
14. RULE GOVERNING TIME LIMITS: NRAP 4(b)
15. JURISDICTION UNDER: NRS 177.815

16. NATURE OF DISPOSITION: JUDGMENT AFTER GUILTY PLEA
PRESERVING ISSUE

17. RELATED PROCEEDINGS IN THIS COURT: NONE

18. RELATED PROCEEDINGS IN OTHER COURTS: NONE

19. PROCEEDINGS RAISING THE SAME ISSUE: NONE

20. PROCEDURAL HISTORY: The case was initiated by Criminal Complaint in the Elko Justice Court. After a Preliminary Hearing, Appellant was bound over to the District Court. He raised the issue therein in a motion to dismiss which was denied. He pled guilty in an agreement preserving this issue.

21. FACTUAL STATEMENT:

Based on a chase through Wells on February 8, 2014, Kelley was charged with felony eluding an officer—violating NRS 484B.550 [formerly NRS 484.348] in that he “willfully failed and/or refused to bring the vehicle he/she was operating to a stop and/or otherwise fled from, or attempted to elude a police officer, one Deputy Shelley, who was in a readily identifiable vehicle of any police department, law enforcement agency, or regulatory agency, after said peace officer had given Kelley a signal, a flashing red lamp and a siren, to bring his/her vehicle to a stop, and furthermore operated the motor vehicle in a manner which endangered or is likely to endanger any other person or the property of any other person by driving the vehicle

[ATV] where the passenger almost fell off several times, and/or almost hitting fuel pumps and/or nearly striking buildings and/or nearly striking Deputy Shelley's patrol car and/or almost hitting a road marker." Appendix [App.] 1-2.

In Wells, based on the same incident he was charged with "Reckless Driving, as defined by Wells City Code 8-11-1 (N.R.S. 484.377)" [now NRS 484B.653] alleging that "The Defendant drove an ATV in willful or wanton disregard of the safety of persons or property in the area of Moor Avenue and Shoshone Avenue within the city of Wells, to wit: The Defendant, Justin Patrick Kelley, did drive an ATV westbound at a high rate of speed, on the left side of Moor Avenue and into oncoming traffic." App. 64-65 (Municipal Complaint).

The chase included, inter alia, Kelley looking back at Shelley's vehicle after its overhead lights were activated while driving in the wrong lane on Moor Avenue. App. 15-16. He turned back around and Shelley--who could see the driver was wearing coveralls, a hood, and what appeared to be a ski mask--turned his siren on. App. 15-16. Alternatively, the transcript may be read to indicate that the siren was turned on after Kelley turned back around, accelerated, and turned the vehicle right on to Shoshone "going through the posted stop light." See App. 16. During the majority of the chase Kelley was going 45-50 MPH in areas zoned at 25 or 35 MPH. App. 17, 23-24.

On November 14, 2014, Kelley pled no contest to the above reckless charge—along with a resisting or interfering with an officer count based on conduct after he was apprehended---and was sentenced on these matters. E.g., App. 67 (Wells Court Sentence).

Kelley then moved for the dismissal of the eluding felony to be dismissed because of double jeopardy. App. 57-67.

After briefing and oral argument on the issue the District Court found that reckless driving was not an underlying offense of felony eluding despite the fact that misdemeanor eluding is counted as reckless. App. 86-87. Despite the fact that NRS 484B.653(1) indicates that violations of the misdemeanor eluding statute constitute reckless driving the District Court believed that misdemeanor reckless should not be read as an underlying offense of felony eluding because it would render the final sentence of NRS 484B.653(1)(“a violation of paragraph (a) or (b) of this subsection or subsection 1 of NRS 484B550 constitutes reckless driving”) superfluous. App. 87.

Thereafter Kelly entered into a plea agreement preserving this issue.

22. ISSUES RAISED

ISSUE ONE: Whether the case should have been dismissed because of double jeopardy.

23. LEGAL ARGUMENT

ISSUE ONE: Whether the case should have been dismissed because of double jeopardy.

Double jeopardy applies to prevent conviction of a greater offense if a defendant is already convicted of a lesser included offense. *Green v. United States*, 355 U.S. 184 (1957)(second degree and first degree murder); *Colin v. Lampert*, 233 F. Supp. 2d 1293 (D. Or. 2002) (second and first degree kidnapping); *State v. White*, 577 N.W.2d 741 (Neb. 1998)(second and first degree murder).

Nevada applies the *Blockburger* [*v. United States*, 284 U.S. 299 (1932)] test for double jeopardy violations by interpreting whether the criminal statutes implicated each require proof of different elements than the other. E.g., *LaChance v. State*, 321 P.3d 919, 130 Nev. Adv. Rep. 29 (2014); *Jackson v. State*, 128 Nev. Adv. Rep. 55, 291 P.3d 1274 (2012).

Under *Blockburger*, it would normally seem as if felony eluding and reckless driving don't each require proof of different elements the other does not. Reckless requires proof of (1) driving a vehicle with (2) willful or wanton disregard for the safety of persons or property. This would seem to require no proof of anything more than what is required for felony eluding since felony eluding requires proof of (1) failing to bring a vehicle to a stop or otherwise fleeing or attempting to elude the peace officer who (2) in a readily identifiable vehicle of any police department or

regulatory agency (3) gives a signal to stop by flashing red light and siren and (4) endangers or likely endangers another person or another person's property. NRS 484B.550. If element (4) is not present the Eluding is merely a misdemeanor. NRS 484.550(1).

Note thus, that reckless driving can be achieved by less specific conduct than eluding and requires a lesser mens rea than eluding. See Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970)(open murder includes lessers including Involuntary Manslaughter). These are additional greater elements than reckless for both eluding and felony eluding.

However, the above Blockburger argument is not even necessary in Nevada because NRS 484B.550 and NRS 484B.653 themselves declare the relationship between the two statutes. Under NRS 484B.550(3) "Unless the provisions of NRS 484B.653 [reckless driving] apply if, while violating the provisions of subsection 1, the driver of the motor vehicle: (a) Is the proximate cause of damage to the property of any other person; or (b) Operates the motor vehicle in a manner which endangers or is likely to endanger any other person or the property of any other person" the driver is guilty of an Eluding felony. (Emphasis added). Similarly, the NRS 484B 653 notes that "a violation of NRS 484.B.550(1) [the underlying misdemeanor version of Eluding] constitutes reckless driving." NRS 484B653(1).

Thus, NRS 484B.653 obviously applied here. Subsection (b) likewise applied here because of, inter alia, the traveling well above the speed limit, in the wrong lane, and accelerating through a red light into a turn. Therefore, Kelley's no contest plea and sentencing under NRS 484B.653 Reckless for the beginning of the same events makes it clear he could no longer be convicted of Eluding without a violation of double jeopardy. As in *Sacco v. State*, 105 Nev. 844, 846-47, 984 P.2d 947 (1989)--where the court interpreted a statute precluding subsequent prosecution following the conviction or acquittal in another state or territory where jurisdiction is concurrent to give more protection against double jeopardy than the Fifth Amendment--it seems clear that when the statute itself gives greater protection against double jeopardy the additional protection prevails. See NRS 171.070 (convictions or acquittals in states or territories as bars)(construed in *Sacco*); see also NRS 171.075 (convictions or acquittals in Nevada counties with concurrent jurisdiction as bars).

Likewise, other states with similar inter-relating definitions of Reckless and Eluding have reached similar results. In *State v. Rutledge*, 194 P.3d 1212, 2008 Kan. App. Unpub. Lexis 936, overruled on other grounds, *State v. Breeder*, 304 P.3d 660 (Kan. 2013), the Kansas Court of Appeals ruled that double jeopardy applied to convictions of felony eluding and reckless where one prong of felony eluding included driving recklessly. In *State v. Mulder* 755 S.E.2d 98 (N.C. App. 2014), the North Carolina Court of Appeals ruled that where speeding and reckless driving

aggravated eluding to a felony, double jeopardy precluded punishments for speeding and reckless driving.

The District Court's finding that instead that despite that fact that misdemeanor eluding and misdemeanor reckless were mutually exclusive by statute but felony eluding and reckless are not simply because it would render the last sentence of NRS 484B.653(1) superfluous seems clearly wrong and in violation of both the rules of construction of statutes for plain meaning and the principle that courts must narrowly construe statutes where ambiguous. See State v. Colosimo, 122 Nev. 950, 960-61, 142 P.3d 352 (2006)(where actual intended victim of intent to have sex with minor was not under sixteen, case was dismissed); State v. Wheeler, 22 Nev. 143 152-53, 44 P. 430 (1986); see also Buschauer v. State, 106 Nev. 890, 895-96, 804 P.2d 1046 (1990)(Court will also narrowly construe criminal statutes where ambiguous).

24. PRESERVATION OF THE ISSUES: The issue was litigated by motion and preserved in a plea agreement.

25. FIRST IMPRESSION OR PUBLIC INTEREST: This does seem to be an issue of first impression.

26. RETENTION OF THE CASE: Appellant suggests the case be retained by the Supreme Court, despite apparent Court of Appeals jurisdiction under Rule 17 (a)(13), since it construes an issue of first impression.

DATED this 18 day of May, 2015.

FREDERICK B. LEE, JR.
ELKO COUNTY PUBLIC DEFENDER
Elko, NV 89801

By: RHS
ROGER H. STEWART
Chief Deputy Public Defender

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman in font 14.

2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is either:

[x] Proportionately spaced, has a typeface of 14 points or more, and contains 2246 words; or

[] Monospaced, has 10/5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

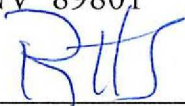
[] Does not exceed 15 pages.

3. Finally, I recognize that pursuant to NRAP 3C, I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal.

I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 18 day of May, 2015.

FREDERICK B. LEE, JR.
ELKO COUNTY PUBLIC DEFENDER
569 Court St.
Elko NV 89801

By: 
ROGER H. STEWART
Chief Deputy Public Defender
Nevada Bar # 3823

CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify, pursuant to the provisions of NRAP 25, that I am an employee of the Elko County Public Defender's Office, and that on the 18 day of May, 2015, I electronically filed a copy of the foregoing, Appellant's Fast Track Statement, and the following parties have consented to receive electronic filings in this matter:

CLERK OF THE SUPREME COURT
Supreme Court Building
201 S Carson Street
Carson City, NV 89701-4702

OFFICE OF THE ATTORNEY GENERAL
100 N. Carson Street
Carson City, NV 89701-4717

MARK TORVINEN
Elko County District Attorney

Deputy Elko County District Attorney
JONATHAN SCHULMAN
COUNTY DISTRICT ATTORNEY'S OFFICE
540 Court Street
Elko NV 89801

A handwritten signature in blue ink, reading "Sharon Butterfield", is written over a horizontal line.

CERTIFICATE OF MAILING

I hereby certify, pursuant to the provisions of NRAP 25, that I am an employee of the Elko County Public Defender's Office, and that on the 18 day of May, 2015, I mailed, postage prepaid, a copy of the foregoing Appellant's Fast Track Statement to the following:

MR. JUSTIN PATRICK KELLEY
P.O. Box 311
Wells, Nevada 89835

A handwritten signature in blue ink, reading "Sharon Butterfield", is written over a horizontal line.