

APPELLATE DIVISION, SUPERIOR COURT OF SAN MATEO COUNTY

People v. Olive

92 Cal. App. 4th Supp. 21, 112 Cal. Rptr. 2d 687 (Cal. App. Dep't Super. Ct. 2001) · No. AD-4645 · Decided July 24, 2001

SUMMARY

The Appellate Division of the San Mateo County Superior Court held that Vehicle Code section 23152, subdivision (a), together with Vehicle Code section 312, was not unconstitutionally vague as applied to driving under the influence of kava. The court concluded that the defendant bore the burden of establishing the statute's unconstitutional application and had failed to do so. It reversed the dismissal of the criminal action and remanded the case for trial.

CASE DETAILS

COURT	Appellate Division, Superior Court of San Mateo County
WRITING FOR THE COURT	Kopp, J.; Holm, P.J.; Pfeiffer, J.
JURISDICTION	California
DECIDED	July 24, 2001
DOCKET	AD-4645
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The People appealed from an order dismissing a Vehicle Code section 23152, subdivision (a), charge after the trial court denied the defendant's suppression motion but dismissed the criminal action based on the defendant's as-applied constitutional challenge to the statute.
STANDARD OF REVIEW	De novo review applies to statutory interpretation and the determination of constitutionality where the defendant makes no factual showing. Statutes are presumed constitutional and must be upheld unless unconstitutionality clearly, positively, and unmistakably appears.
PRECEDENTIAL VALUE	Published opinion; precedential value within the applicable California appellate system, subject to subsequent treatment.
PARTIES	The People v. Sione Olive

TOPICS

void for vagueness

due process

statutory interpretation

criminal procedure

appellate procedure

PRACTICE AREAS

Criminal law

Criminal procedure

Constitutional law

Appellate procedure

QUESTIONS PRESENTED

1. Whether the defendant, rather than the People, bore the initial burden of establishing that Vehicle Code section 23152, subdivision (a), was unconstitutional as applied to his conduct.
2. Whether Vehicle Code section 23152, subdivision (a), construed with Vehicle Code section 312, is unconstitutionally vague because it does not specifically identify kava as a prohibited drug.
3. Whether the trial court's dismissal should be reversed where the dismissal was not based on Penal Code section 1385 and the defendant failed to establish an as-applied constitutional violation.

HOLDINGS

1. A defendant challenging the constitutionality of Vehicle Code section 23152, subdivision (a), as applied must first establish the factual basis for the claimed unconstitutional application; the People need not respond until that initial showing is made.
2. Vehicle Code section 23152, subdivision (a), construed together with Vehicle Code section 312, is not unconstitutionally vague merely because it does not identify kava by name.

KEY QUOTATIONS

"A criminal statute satisfies due process so long as it is "definite enough to provide a standard of conduct for those whose activities are proscribed [citations]" and "provide[s] definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. [Citations.]" (690)

"It describes conduct; it does not purport to identify particular drugs, and it is not required constitutionally in this case to do so." (691)

FACTUAL BACKGROUND

At approximately 1:20 a.m., California Highway Patrol officers stopped Olive after observing him driving erratically at a slow speed. Olive had difficulty maintaining his balance, exhibited red and watery eyes, performed poorly on physical sobriety tests, and stated that he had consumed approximately 23 cups of kava and felt "slow and heavy." A preliminary alcohol screening test showed 0.00 percent alcohol, and an officer arrested him for driving while impaired by alcohol or a drug.

PROCEDURAL HISTORY

Olive was charged with driving under the influence of a substance other than alcohol. He moved to suppress postarrest urine-test evidence and moved to dismiss, arguing that Vehicle Code section 23152, subdivision (a), was vague and violated due process because it did not specifically identify kava as a drug. The trial court denied suppression but dismissed the action. The appellate division reversed and remanded for trial.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The dismissal is reversed and the case is remanded for trial.

CASES CITED

- People v. Archerd, 3 Cal. 3d 615, 639, 91 Cal. Rptr. 397, 477 P.2d 421 (1970)
- People v. Health Laboratories of North America, Inc., 87 Cal. App. 4th 442, 445, 104 Cal. Rptr. 2d 618 (2001)
- Smith v. Peterson, 131 Cal. App. 2d 241, 246, 280 P.2d 522 (1955)
- People v. Heitzman, 9 Cal. 4th 189, 199-200, 37 Cal. Rptr. 2d 236, 886 P.2d 1229 (1994)
- Burg v. Municipal Court, 35 Cal. 3d 257, 270-272, 198 Cal. Rptr. 145, 673 P.2d 732 (1983)
- People v. Buese, 220 Cal. App. 2d 802, 806-807, 34 Cal. Rptr. 102 (1963)
- People v. Avila, 80 Cal. App. 4th 791, 798, 802-803, 95 Cal. Rptr. 2d 651 (2000)
- People v. Keith, 184 Cal. App. Supp. 2d 884, 7 Cal. Rptr. 613 (1960)

OPINION

PER CURIAM.

112 Cal. Rptr. 2d 687 (2001) 92 Cal.App.4th Supp. 21 The PEOPLE, Plaintiff and Appellant, v. Sione OLIVE, Defendant and Respondent. No. AD-4645. Appellate Division, Superior Court, San Mateo County. July 24, 2001. *688 Rachel Holt, for Respondent. Hugo Borja, for Appellant. KOPP, J. This appeal involves a legal issue of first impression and continuing public interest in California.

Respondent, driving erratically at a slow speed southbound on U.S. Highway 101 at 1:20 a.m. on June 17, 2000, was stopped by California Highway Patrol officers. Requested to walk to the officers' vehicle, respondent displayed difficulty in maintaining his balance. His movements were deliberate, slow and sluggish; his eyes were red and watery. He denied drinking any alcohol but stated he had consumed approximately 23 cups of kava.

Asked if he felt any effects from the kava, respondent replied that he felt "slow and heavy." Immediately thereafter, physical sobriety tests were administered to the respondent. His performance was flawed. A preliminary alcohol screening test showed 0.00% alcohol in his blood. One of the officers then arrested respondent after forming the opinion that respondent was under the influence of alcohol or a drug and his ability to operate a motor vehicle safely was impaired.

Appellant commenced criminal action against respondent on June 19, 2000, accusing him of violating Vehicle Code section 23152, subdivision (a).[1] Respondent moved to dismiss the charge, claiming unconstitutionality of section 23152, subdivision (a) as applied to him in the circumstances of the case. He alleged the statute was "overly broad and vague" and its application on the facts of the case denied him "due process of law."

Respondent further contended section 23152, subdivision (a) provides no notice that driving under the influence of kava is a crime and that neither by statute nor case law is kava deemed a drug under section 23152, subdivision (a). Respondent also moved pursuant to Penal Code section 1538.5 to suppress evidence from a postarrest urine test. Respondent's motion to suppress evidence was considered first by the trial court at a hearing in which the arresting officer testified for appellant and was cross-examined *689 by respondent.

The respondent neither produced any evidence nor exercised responsibility for sustaining the burden of his motion to dismiss the case. In fact, appellant's evidentiary presentation anent the motion to suppress evidence and the testimonial hearing thereon were subsumed by the court's consideration of the motion to dismiss for unconstitutionality.

The trial court denied the motion to suppress evidence and, after considering legal argument in which the court requested appellant to proceed first, ordered dismissal of the case, declaring it was doing so: "in this case, under these circumstances, based on the evidence in this particular record." Appellant appeals, claiming dismissal occurred pursuant to Penal Code section 1385 "in furtherance of justice" and that the trial court abused its discretion thereunder.

We reverse, not because Penal Code section 1385's discretionary power was abused (Penal Code section 1385 was not the basis of dismissal), but because (1) respondent, not appellant, bears the burden in his due process attack of showing Vehicle Code section 23152, subdivision (a)'s unconstitutionality as applied and failed utterly to do so, and (2) such showing as was adduced in the motion to suppress hearing persuades us the statute is constitutional as applied to respondent.

As noted in *People v. Archerd* (1970) 3 Cal. 3d 615, 639, 91 Cal. Rptr. 397, 477 P.2d 421, in which the defendant raised preindictment delay as a violation of his due process right to a speedy trial, an accused must demonstrate "prejudice or improper motive by the prosecution... [and thereafter] the burden shifts to the People to show that the pre-indictment delay was the result of a valid police purpose."

Similarly, respondent, not appellant, was first obliged procedurally to establish, by experts or other evidentiary sources, unconstitutional application, after which appellant could respond. Since no facts were advanced by respondent concerning unconstitutional application of section 23152, subdivision (a) to him, he rests his unconstitutionality argument upon the lack of any judicial

decision and omission of a literal statutory statement that kava constitutes a "drug" within the meaning of section 23152, subdivision (a).

We could remand to the trial court for failure to compel respondent's execution of his burden to show unconstitutionality of section 23152, subdivision (a) as applied. We do not do so because interpretation of a statute and the determination of its constitutionality are questions of law, absent any factual showing by an accused.

As an appellate court, we apply a de novo standard of review. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal. App. 4th 442, 445, 104 Cal. Rptr. 2d 618.) All presumptions favor the validity of a statute, and statutes "must be upheld unless their unconstitutionality clearly, positively and unmistakably appears." (*Smith v. Peterson* (1955) 131 Cal. App.

2d 241, 246, 280 P.2d 522.) A criminal statute satisfies due process so long as it is "definite enough to provide a standard of conduct for those whose activities are proscribed [citations]" and "provide[s] definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. [Citations.]" (*People v. Heitzman* (1994) 9 Cal. 4th 189, 199-200, 37 Cal. Rptr.

2d 236, 886 P.2d 1229.) A statute must give fair warning and sufficiently inform ordinary people with average intelligence of the acts it declares prohibited and punishable. (*Burg v. Municipal Court* (1983) 35 Cal. 3d 257, 270-272, 198 Cal. Rptr. 145, 673 P.2d 732.)

The defendant in *Burg* challenged the then existing 0.10 percent blood-alcohol standard for conviction *690 of a section 23152, subdivision (b) violation, with a vagueness theory that it was impossible "for a person to determine by means of his senses whether his blood-alcohol level is a 'legal' 0.09 percent or an 'illegal' 0.10 percent." (*Burg*, at p. 270, 198 Cal. Rptr.

145, 673 P.2d 732) The court rejected defendant's curious theory and commented that consumption of a quantity of alcohol "should notify a person of ordinary intelligence he is in jeopardy of violating the statute." (*Id.* at p. 271, 198 Cal. Rptr. 145, 673 P.2d 732.) Respondent herein contends that without inclusion of kava, in haec verba, section 23152, subdivision (a) is void for vagueness.

Actual notice of each drug constituting a basis for prosecution under section 23152, subdivision (a) is not required if a person is reasonably made aware of the proscribed conduct, namely, impaired driving ability resulting from ingestion of some substance. "It is not required that a statute, to be valid, have that degree of exactness which inheres in a mathematical theorem.

It is not necessary that a statute furnish detailed plans and specifications of the acts or conduct prohibited." (*Smith v. Peterson*, *supra*, 131 Cal.App.2d at p. 246, 280 P.2d 522.) In *People v. Buese* (1963) 220 Cal. App. 2d 802, 806-807, 34 Cal. Rptr. 102, the court held not void for vagueness a statute barring transportation of "drugs" into a county jail.

The drug in issue was a hypnotic. The court observed: "'Drugs' is the general word used in association with 'narcotics' and 'alcoholic beverages.' These terms have a number of things in common, included among which is the fact that they are taken internally and when so taken they affect the brain, and particularly that function of the brain controlling judgment.

By use of the word 'drugs' it is reasonable to assume the Legislature intended to include those drugs having similar characteristics. So interpreted hypnotic drugs are clearly within a much larger group possessing such similarity." (Id. at p. 807, 34 Cal. Rptr. 102.)

As used in section 23152, "drug" is defined by section 312, which declares: "The term 'drug' means any substance or combination of substances, other than alcohol, which could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his ability to drive a vehicle in the manner that an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would drive a similar vehicle under like conditions."

Omission of kava by its name does not render section 23152, subdivision (a) unconstitutionally vague as applied. (People v. Avila (2000) 80 Cal. App. 4th 791, 802-803, 95 Cal. Rptr. 2d 651; People v. Keith (1960) 7 Cal. Rptr. 613, 184 Cal. App. Supp. 2d 884.)

In Avila, a Penal Code section 286, subdivision (i) action, the Court of Appeals iterated: "A statute provides adequate notice when its 'language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" (People v. Avila, supra, 80 Cal.App.4th at pp. 802-803, 95 Cal. Rptr. 2d 651, italics added.)

No actual substance was (or is) identified in Penal Code section 286, subdivision (i). There, the court held the purpose of the allegedly vague language in that statute was "to define the crime in terms that clearly warn against the commission of sodomy on a victim whose ability to resist,... is prevented by substances having anesthetic or intoxicating effects...."

(Avila, at p. 798, 95 Cal. Rptr. 2d 651.) Section 23152, subdivision (a) provides that vehicle operation while under the influence of a substance other than alcohol which could "affect the nervous system, brain, or muscles" (Veh.Code, § 312) in *691 such a way as to impair a person's ability to drive as an ordinarily prudent and cautious man using reasonable care would drive a vehicle under like conditions is a crime.

It describes conduct; it does not purport to identify particular drugs, and it is not required constitutionally in this case to do so. (Testimony offered by appellant at the hearing on the motion to suppress evidence demonstrates respondent was himself aware of kava's effects the very night of his arrest; he felt "slow and heavy").[2] Because respondent failed to sustain the burden of proof created by his due process motion to dismiss for unconstitutionality as applied and because section 23152, subdivision (a) in conjunction with section 312 conveys legally sufficient warning about the prohibited conduct, the judgment dismissing the criminal action against respondent is reversed.

The case is remanded for trial. HOLM, P.J. and PFEIFFER, J. concurred. NOTES [1] All statutory references are to the Vehicle Code unless otherwise stated. [2] The effects upon his motoring ability were plainly observed by the arresting officer, who also observed respondent's flawed performance on physical sobriety tests.

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