Case No. 109124

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff / Appellee,

vs.

RANDALL CAPONE,

Defendant / Appellant.

Appeal from the District Court of Johnson County,
Honorable Thomas H. Bornholdt, District Judge
District Court Case No. 2011-CR-849

PETITION FOR REVIEW

JONATHAN STERNBERG, Kan. #25902
Jonathan Sternberg, Attorney, P.C.
911 Main Street, Suite 2300
Kansas City, Missouri 64105
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
RANDALL CAPONE

Table of Contents

Prayer for Review

Appellant Randall Capone hereby requests this Court to review the unpublished decision of the Court of Appeals of the State of Kansas in this case, pursuant to Supreme Court Rule 8.03. At least one issue for which review is sought is dependent on this Court's pending decision in *State v. Reese*, Case No. 106703 (submitted Jan. 30, 2014).

Date of the Decision of the Court of Appeals

The date of the decision of the Court of Appeals is January 24, 2014.

Statement of the Issues for Which Review is Sought

I. Whether, despite K.S.A. § 8-1567 (supp. 2011), which limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001, the State introduced sufficient evidence to prove probable cause to bind Appellant over for trial on a charge of felony third DUI by introducing two previous DUI convictions of Appellant that occurred *before* July 1, 2001.

II. Whether, despite K.S.A. § 8-1567 (supp. 2011), which limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001, the Court of Appeals correctly affirmed the defendant's sentence for felony third DUI, when, at sentencing, the only evidence of his prior offenses was two previous DUI convictions from *before* July 1, 2001.

III. Whether the State meets its burden to prove the "driving" element of DUI beyond a reasonable doubt by only introducing evidence that two witnesses saw the defendant from afar enter a vehicle and then saw the vehicle drive off, but no keys to the vehicle ever were found on the defendant's person or anywhere in the vehicle's vicinity.

Statement of Facts

The Court of Appeals accurately states most of the bare facts of the case, but misstates certain facts as actually reflected in the record. (Opinion 1-5). The following includes both additional facts presented to the Court of Appeals that its opinion did not address, as well as corrections to facts the Court of Appeals misstated.

On the evening of February 12, 2011, Randall Capone went to Danny's Bar and Grill, located in a strip mall in Lenexa, Kansas, around 11:00 p.m. He parked his black 2007 Chevy Silverado crew cab pickup truck in the strip mall parking lot near Danny's. Once inside, Mr. Capone drank heavily, becoming intoxicated.

At around 1:00 a.m., Mr. Capone exited Danny's, followed by waitress Dawn Watson and doorman Nick Baggett. At trial, Ms. Watson testified she saw Mr. Capone get into his truck on the driver's side, heard the truck's engine start, and then saw the truck drive away. Contrary to the Court of Appeals' statements, Ms. Watson never testified that she actually, personally saw Mr. Capone physically drive the truck.

Mr. Baggett, too, only testified he saw Mr. Capone walk towards his truck, get into the driver's side, heard the truck's engine start, and saw the truck drive to the QuikTrip across the parking lot. Again, contrary to the Court of Appeals' opinion, Mr. Baggett never testified he saw Mr. Capone personally, physically drive the truck. Furthermore, Mr. Baggett testified he could not tell if anyone else besides Mr. Capone was in the truck, which had tinted windows preventing him from seeing "a hundred percent into the" truck.

After an attendant in the nearby QuikTrip saw Mr. Capone there, visibly intoxicated and stumbling around, with his truck parked outside the QuikTrip store, the

attendant called the police. Moments later, Corporal Sumner of the Lenexa Police Department arrived and attempted to question Mr. Capone regarding the evening's events. Mr. Capone denied drinking and driving. Despite Corporal Sumner's investigation, he testified the keys to Mr. Capone's truck were never found anywhere in the vicinity of the QuikTrip: on Mr. Capone's person, inside the QuikTrip store, in the truck, or outside on the ground near the truck. It goes without saying that one cannot drive a truck without its keys.

The district court held a preliminary hearing on January 4, 2012. Beforehand, Mr. Capone's objected to the court's jurisdiction to hear a charge against him for felony third DUI under K.S.A. § 8-1567 (supp. 2011), which, effective July 1, 2011, amended the prior version of the statute to make its "look-back" period for prior DUIs only those since July 1, 2001. The court overruled the objection and held the prior version of the law, which included a *lifetime* look-back period, applied. At the preliminary hearing, the State only introduced evidence of two prior DUI convictions of Mr. Capone from *before* July 1, 2001.

On January 27, 2012, Mr. Capone moved the court to continue the trial due to pending cases before this Court and the Supreme Court that addressed the jurisdiction of courts to charge defendants with heightened DUI offenses under K.S.A. § 8-1567 based on prior convictions before 2001. This included *State v. Reese*, Case No. 106703, in which this Court granted review on October 1, 2013, and heard oral argument on January 30, 2014. The court denied the motion on the basis that Mr. Capone's case would "likely go stale, evidence could be lost, and memories will probably fade," though the court admitted this case and *Reese* presented similar facts.

The case was tried before a jury on October 1, 2012. Mr. Capone's defense was that, while he was indeed very intoxicated on the night of the arrest, he never drove. Nonetheless, an eleven-member jury, one fewer due to illness, found Mr. Capone guilty.

After trial, Mr. Capone moved for a judgment of acquittal, explaining the State's evidence was insufficient to prove beyond a reasonable doubt that he had driven. He also moved for arrest of judgment, reasserting his claims that the court did not have jurisdiction to hear felony charges against him because his prior DUI convictions occurred before July 1, 2001. The motion also explained there was insufficient proof at the preliminary hearing to establish probable cause that Mr. Capone had driven while under the influence. The court heard and denied all three motions shortly before the sentencing hearing on December 6, 2012.

At sentencing, a presentence investigation report advised of Mr. Capone's two prior DUI convictions from *before* July 1, 2001. Mr. Capone again objected to the court using the prior convictions to sentence him for a felony, which the court overruled.

On January 24, 2014, six days before this Court heard argument in *Reese*, the Court of Appeals issued an opinion affirming the district court's Judgment. As to the issue of the retroactivity of K.S.A. § 8-1567 (supp. 2011)'s "look-back" period, the court observed this Court had granted review in *Reese*, which it acknowledged was similar, but elected to affirm Mr. Capone's conviction anyway under its prior opinion in *Reese*, 48 Kan.App.2d 87, 283 P.3d 233 (2012) (Opinion 6-7).

Mr. Capone has sought rehearing or modification in the Court of Appeals. The court has not yet ruled on his request.

This petition follows.

Argument and Authorities

I. The Court should review whether, despite K.S.A. § 8-1567 (supp. 2011), which limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001, the State introduced sufficient evidence to prove probable cause to bind Appellant over for trial on a charge of felony third DUI by introducing two previous DUI convictions of Appellant that occurred *before* July 1, 2001.

Standard of Review

"When reviewing the district court's probable cause finding, an appellate court conducts a de novo review of the evidence." *State v. Horton*, 283 Kan. 44, 56, 151 P.3d 9 (2007). "'Issues of statutory interpretation and construction ... raise questions of law reviewable de novo on appeal.'" *State v. Brown*, 295 Kan. 181, 193-94, 284 P.3d 977 (2012). They are questions "of law over which an appellate court exercises unlimited review." *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).

* * *

To prove probable cause sufficient to bind a defendant over for trial on charge of felony third DUI, the State must prove the defendant was convicted of two prior offenses as defined by statute. Since July 2011, K.S.A. § 8-1567 has required that only DUI convictions from *after* July 1, 2001, are applicable. In this case, the State only introduced evidence that the defendant had two prior DUI convictions from *before* July 1, 2001. Nonetheless, the trial court found probable cause. The Court of Appeals refused to consider this issue, reasoning that it presented no new arguments distinct from those in *State v. Reese*, discussed in Issue II, below. Were the lower courts' conclusions error?

It is well-established that, in a felony third DUI case,

> To establish the basis for charging and trying a defendant for a felony, a determination of probable cause to believe that a felony, a determination of probable cause to believe that a felony has been committed must be

> made ... by a judge after a preliminary hearing. Without a showing that the necessary prior convictions have occurred, the trial court would lack the jurisdiction to try the defendant for a felony.

State v. Seems, 277 Kan. 303, 305-06, 84 P.3d 606 (2004). Instead, "the case must be dismissed." *Id.*

Before July 1, 2001, K.S.A. § 8-1567(f)(1) provided that "the third conviction of" DUI was "a nonperson felony …." Effective July 1, 2001, however, Laws 2011, ch. 105, § 19 (2011 Senate Bill 6), took effect. In what became § 8-1567(b)(1)(D), the statute thereafter provided that a third offense of DUI is a felony only "if the person has a prior conviction which occurred within the preceding 10 years." Even then, this only includes convictions "occurring on or after July 1, 2001." § 8-1567(j)(3).

At the preliminary hearing in this case on January 4, 2012, in an attempt to meet its burden to prove the necessary prior convictions for felony third DUI, the State offered into evidence two journal entries of Appellant Randall Capone's prior convictions for driving under the influence. Neither conviction, however, was from within the previous ten years, nor were they from after July 1, 2001. Despite Mr. Capone's motion to dismiss for lack of evidence meeting § 8-1567(b)(1)(D), the trial court overruled Mr. Capone's motion and found probable cause, holding the prior version of § 8-1567 applied to the probable cause inquiry, not the post-July 2011 version.

The Court of Appeals affirmed the trial court's finding of probable cause at the preliminary hearing, reasoning Mr. Capone "did not present any new arguments that were not addressed in" *State v. Reese*, 48 Kan.App.2d 87, 283 P.3d 233 (2012) (Opinion 6-7), wherein the Court of Appeals had held the 2011 version of the statute was not retroactive as to *sentencing* decisions. As to this issue, however, it held that, under *Reese*, § 8-

1567(b)(1)(D) was inapplicable to Mr. Capone's January 2012 preliminary hearing. On October 1, 2013, this Court granted review in *Reese* specifically to address the sentencing issue there (the second issue presented in this petition).

But the Court of Appeals failed to address this entirely *separate* issue in this case: not whether the 2011 version of the statute applied merely to a sentencing proceeding that occurred after its enactment, as in *Reese*, but whether it applied to a probable cause determination that occurred after its enactment. Unlike in *Reese*, where only sentencing occurred after July 2011, here, Mr. Capone underwent a probable cause hearing, trial, *and* sentencing after the enactment of the 2011 version of § 8-1567. Conversely, the *only* facet of this case that occurred before July 2011 was the alleged offense and the State's information charging Mr. Capone with felony third DUI. That was not so in *Reese*.

Nonetheless, the Court of Appeals believed all aspects of this case are "highly analogous to *Reese*" and found *Reese* holdings "very persuasive" as to this separate probable cause issue (Opinion 6-7). But the Court of Appeals issued its opinion in this case on January 24, 2014, despite its express acknowledgement that this Court already had granted review in *Reese*, which would resolve at least the issue there (again, the second issue presented in this petition) (Opinion 6-7). In fact, this Court heard oral argument in *Reese* only six days after the Court of Appeals issued its decision on January 30, 2014. Rather than waiting to see what this Court ultimately resolved, the Court of Appeals issued its decision in this case anyway.

If this Court ultimately determines in *Reese* that the "look-back" provision of § 8-1567 (Supp. 2011) is applied to all proceedings that occur after its enactment, the Court of Appeals' decision in this case, only relying on *Reese*, plainly would be wrong. Even if

the Court holds in *Reese* that provision should not be applied in that manner under the specific circumstances of that case, however, which are different from those here, it still should review this case to address this separate issue as to probable cause proceedings, *not* sentencing proceedings, which are subject to a different statutory provision.

II. The Court should review whether, despite K.S.A. § 8-1567 (supp. 2011), which limits its "look-back" period for prior DUI convictions only to those from *after* July 1, 2001, the Court of Appeals correctly affirmed the defendant's sentence for felony third DUI, when, at sentencing, the only evidence of his prior offenses was two previous DUI convictions from *before* July 1, 2001.

Standard of Review

"Interpretation of a sentencing statute is a question of law, and an appellate court's standard of review is unlimited." *State v. Gracey*, 288 Kan. 252, 257, 1200 P.3d 1275 (2000). "'Issues of statutory interpretation and construction" are "questions of law reviewable de novo on appeal.'" *State v. Brown*, 295 Kan. 181, 193-94, 284 P.3d 977 (2012). They are questions "of law over which an appellate court exercises unlimited review." *State v. Arnett*, 290 Kan. 41, 47, 223 P.3d 780 (2010).

* * *

To sentence a defendant for DUI as a felony third offense, there must be evidence at sentencing that the defendant was convicted of two prior offenses as defined by statute. K.S.A. § 8-1567 (Supp. 2011) provides that the trial court only may take into account DUI convictions from *after* July 1, 2001. Nonetheless, in this case, though there only was evidence the defendant had two prior DUI convictions from *before* July 1, 2001, the Court of Appeals affirmed the trial court's felony sentence. Was this error?

Appellant Randall Capone concedes that this issue is the same as the main issue in *State v. Reese*, Case No. 106703, which presently is under submission before this Court.

When interpreting a statute, this Court looks to the statute's actual words and "ascertain[s] the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning." *State v. Stallings*, 284, Kan. 741, 742, 163 P.3d 1232 (2007). "When a statute is plain and unambiguous," the Court must "give effect to the legislature's expressed intent, resisting the temptation to determine what the law should or should not be." *Id*. at 742-43.

As explained above, in Issue I, K.S.A. § 8-1567 (Supp. 2011) provides that a third offense of DUI is "a nonperson felony if the person has a prior conviction which occurred within the preceding 10 years." § 8-1567(f)(1). The statute also speaks of *the trial court* "tak[ing] into account" only previous convictions "occurring on or after July 1, 2001" in "determining the *sentence to be imposed* for a first, second, third, fourth or subsequent offender …." § 8-1567(j)(3) (emphasis added). The statute's wording is plain and unambiguous in directing the procedure to be applied during sentencing.

Before sentencing, Mr. Capone's objected to the application of § 8-1567 in its prior form, which contained a *lifetime* "look-back" provision. His only prior DUI convictions in evidence at sentencing were from *before* July 2001. The trial court overruled his objection, sentenced him for felony third DUI, and he appealed.

Applying its prior decision in *State v. Reese*, 48 Kan.App.2d 87, 89, 283 P.3d 233 (2012) the Court of Appeals affirmed Mr. Capone's sentence.

Reese, presently under review, and the Court of Appeals' decision in this case both were error. The post-July 2011 version of § 8-1567 was in effect during *all* proceedings below, including sentencing. Under that version of the statute, the trial court should not have considered Mr. Capone's two prior convictions at sentencing. Under the

statute by then in effect, both of his prior offenses were from *before* July 1, 2001, the statute's cut-off date.

Generally, "a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retrospectively." *Reese*, 48 Kan.App.2d at 89. An exception to this general rule is when "the statutory change does not prejudicially affect the substantive rights of the parties and is merely procedural or remedial in nature." *Id*. While substantive law describes what acts are criminal and what the punishments for violation are, "procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." *Tonge v. Werholtz*, 279 Kan. 481, 487, 109 P.3d 1140 (2005).

The sentencing procedure changes to § 8-1567, which took effect in July 2011, plainly describe merely the procedural process that a trial court must use when determining the level of the DUI offense. Neither the elements of the underlying crime nor the penalties proscribes for its violation were changed. Only the scope of which the convictions the court may consider changed.

Should this Court decided in the *Reese* defendant's favor, the Court of Appeals' decision in this case plainly will be incorrect. As it already has done in *Reese*, the Court should review the Court of Appeals' decision in this case, too.

III. The Court should review whether the State meets its burden to prove the "driving" element of DUI beyond a reasonable doubt by only introducing evidence that two witnesses saw the defendant from afar enter a vehicle and then saw the vehicle drive off, but no keys to the vehicle ever were found on the defendant's person or anywhere in the vehicle's vicinity.

Standard of Review

This Court reviews the sufficiency of evidence in a criminal case for "whether, after review of all the evidence, viewed in a light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. McCaslin*, 291 Kan. 697, 710, 245 P.3d 1030 (2011). If the evidence was insufficient even as to one element of the offense, the conviction must be reversed. *State v. Dinh*, 296 Kan. 230, 290 P.3d 652 (2012).

A conviction "can be based entirely on circumstantial evidence and the inferences fairly deducible therefrom," but any such inference must be "reasonable." *Id.* (citation omitted). Reasonable inferences cannot be based solely on other circumstantial inferences. *State v. Richardson*, 289 Kan. 118, 127, 209 P.3d 696 (2009).

* * *

To convict a defendant for DUI, the State must introduce sufficient evidence to prove beyond a reasonable doubt that the defendant operated a vehicle. Inferences based on inferences are insufficient to prove this. Here, two witnesses testified they saw the defendant from afar enter the driver's side door of his truck, which they then observed drive off. The State's evidence, though, also was that no keys to the truck ever were found on the defendant's person or anywhere in the vicinity of his truck. Nonetheless, the Court of Appeals concluded it was reasonable to infer the defendant had driven his truck. Did this inference also depend on an inference that he had possessed its keys?

Under K.S.A. § 8-1567(a), the offense of DUI involves only two elements: "[1] operating or attempting to operate any vehicle … [2] while ... under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle."

This Court adheres to "a rule against basing an inference on an inference …." *State v. Cruz*, 15 Kan.App.2d 476, 491, 809 P.2d 1233 (1991) (citation omitted). It is "reversible error to allow the jury to speculate on unjustifiable inferences." *Id.* at 490. This is because "[g]uilt may never be based on inference alone. Presumptions and inferences may be drawn from facts established, but presumption may not rest upon presumption or inference on inference." *Id.*

The only evidence the State introduced in this case to prove the "driving" element of DUI was testimony by two witnesses, Dawn Watson and Nick Baggett, who said they saw Mr. Capone get into the driver's side of his truck, heard the truck's engine start, and saw the truck move. Neither actually, physically saw Mr. Capone operate the truck. Moreover, the State's police officer witness testified no keys to the truck ever were found on Mr. Capone's person or anywhere in the vicinity of the truck.

Until now, the law of Kansas has been that an inference from Ms. Watson and Mr. Baggett's testimony that Mr. Capone physically operated the truck depends on a string of other inferences and, therefore, is unreasonable and impermissible. It would depend on finding each of these four entirely separate inferences: (1) no one else drove the truck, (2) Mr. Capone sat in the driver's seat of the truck, (3) Mr. Capone possessed the instrumentality necessary to start the truck (i.e. its keys), and (4) Mr. Capone was physically capable of operating the truck. Even if (1), (2), and (4) possibly had been established, there was simply *no evidence of any kind* that Mr. Capone possessed the keys

to the truck – keys that never were found. Even if one could infer that Mr. Capone somehow possessed the keys to the truck, the ultimate determination that he drove *still* automatically would be an impermissible inference based on that other inference.

In all prior cases in which Kansas courts found circumstantial evidence sufficient to prove the "driving" element of DUI, none have involved inferences based on inferences. Instead, in every single one, either the vehicle's keys were found on the defendant or in the ignition, with the defendant alone. *See State v. Stevens*, 285 Kan. 207, 316-17, 172 P.3d 570 (2007) (keys found in ignition, defendant seen by witnesses physically seated in driver's side of car); *State v. Suter*, 296 Kan. 137, 290 P.3d 620, 629 (2012) (defendant admitted to an officer that he was the driver and did not suggest anyone else drove); *State v. Adame*, 45 Kan.App.2d 1124, 1128-29, 257 P.3d 1266 (2011) (same); *State v. Riedl*, 15 Kan.App.2d 326, 327, 807 P.2d 697 (1991) (same); *State v. Sanchez*, 48 Kan.App.2d 608, 613-14, 296 P.3d 1133 (2013) (defendant passenger admitted "grabbing the wheel" from the driver).

Independent of the first two issues above, this Court should review this case to determine whether an inference of possessing a vehicle's keys now is sufficient then also to infer that the defendant drove. Under the law as it has stood until now, even if the jury disbelieved Mr. Capone's witnesses, as there was no direct evidence Mr. Capone ever possessed the keys to the vehicle and, instead depends on an inference, the jury could not reasonably use that inference to reach another inference Mr. Capone drove.

Conclusion

The Court should review the Court of Appeals' decision in this case.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by_____

Jonathan Sternberg, Kan. #25902
911 Main Street, Suite 2300
Kansas City, Missouri 64105
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
E-mail: jonathan@sternberg-law.com

COUNSEL FOR APPELLANT
RANDALL CAPONE

Certificate of Service

I hereby certify that, on February 21, 2014, I mailed a true and accurate copy of this petition for review to the following:

Mr. Shawn E. Minihan,
Assistant District Attorney
Johnson County Courthouse
P.O. Box 728
Olathe, Kansas 66051-0728
Telephone: (913) 715-3124
Facsimile: (913) 715-3050

Counsel for Appellee
State of Kansas

Hon. Derek Schmidt,
Kansas Attorney General
Memorial Hall, 2nd Floor
120 SW 10th Street
Topeka, Kansas 66612
Telephone: (785) 296-2215
Facsimile: (785) 296-6296

Counsel for Appellee
State of Kansas

_____
Attorney

Appendix

- **Court of Appeals Opinion (January 24, 2014)**
- **Journal Entry of Judgment (December 17, 2012)**