SUPREME COURT

STATE OF LOUISIANA

98-CA-2442

STATE OF LOUISIANA,
Appellant
VERSUS

JOSEPH DAVIS FERRIS,
Appellee

ON DIRECT APPEAL FROM THE THIRTEENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF EVANGELINE, STATE OF LOUISIANA
HONORABLE PRESTON N. AUCOIN, PRESIDING JUDGE
DOCKET NO. 56,984-T

ORIGINAL BRIEF ON BEHALF OF DEFENDANT-APPELLEE, JOSEPH DAVIS FERRIS

RESPECTFULLY SUBMITTED:

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STATEMENT OF THE CASE

This is an appeal by the State of Louisiana from a ruling by the 13th Judicial District ruling that L.S.A.-R.S. 14: 98.1, was unconstitutional, and, thus, quashing the prosecution of the Defendant, Joseph D. Ferris, an eighteen year old.

FACTS

On July 31, 1998, the State charged Appellee, Joseph D. Ferris, with having violated LSA R.S. 14:98.1, mistitled as "Underage driving under the influence" which provides:

> A. The crime of underage operating a vehicle while *intoxicated* is the operating of any motor vehicle…..when the operator's blood alcohol concentration is .02 percent or more…if the operator is under the age of twenty-one…." (Emph. Supp)

The State had previously notified the defendant through discovery that it would prosecute based on a B.A.C. result of .07%. Further, the documents provided to the defendant at the time of arrest, namely, the "Rights Related to Chemical Test for **Intoxication**" form, specifically stated:

> *"PERSONS UNDER THE AGE OF TWENTY-ONE YEARS*
>
> * * *
>
> 1. The results ***will be used*** against you at your trial and ***will be conclusive evidence that you are intoxicated***.
>
> 2. Your driver's license shall be suspended for a period of ninety days . . . " (Emphasis in bold and italics supplied)

Therefore, the District Attorney intended to use a presumption under 14:98.1 that .07% was "conclusive evidence of intoxication." Such presumption is not applicable to anyone twenty-one or older unless they test at least .10%. *L.S.A -R.S. 14: 98 (A)(1)(b)*

By attempting to convict Mr. Ferris of a crime under a lower standard of conduct than any other 21 or older *adult* similarly tested, the State was violating his rights and that of all *adults* of this State in like circumstances, to have the criminal laws applied equally to all. The Bill of Information against Mr. Ferris was properly quashed and the Statute relied upon

properly found to be unconstitutional. 1.

LEGISLATIVE HISTORY:

Prior to 1994, all persons, seventeen years of age or over, who operated a motor vehicle while having a blood alcohol concentration of .l0% or greater, were presumed to be guilty of DWI. In 1994, the legislature amended R.S. 14:98 and added that any person who was seventeen years old or younger and who operated a motor vehicle while having a blood alcohol concentration of only .04 % or more, was presumed guilty of a DWI. In so doing the legislature created two separate standards, one for eighteen years and older and another for seventeen years and younger. In the case of *State v. Adrienne Smith*, 96-KA-1798, 700 So.2d 493 (1997) the 19th Judicial District Court properly found said amendment unconstitutional. Your Honors reversed on other grounds without reaching the constitutional issue.

The legislature next, through Acts 1997, No. 1296, Section 2, effective July 15, 1997, adopted *LSA- R.S. 14:98.1*, in effect creating a triple classification (seventeen to twenty year old at .02% cent plus, seventeen to twenty at .10% plus, and twenty-one and above at .l0% plus) which was even more unconstitutional than the previous amendment to LSA - R.S. 14:98 because such discrimination is without rational basis whatsoever.

ISSUE:

Contrary to the impassioned pleas of the State, and even that of Amicus Curie, the issue before this Court is ***not*** the driving privileges of adults seventeen to twenty-one, teenage drinking age, highway funding, nor even what could or should be done to lower the number of accidents of any particular age group.

The issue was correctly set out by the District Judge:

> "The question before the court, . . . one of first impression, is not can an eighteen year old receive a DWI conviction for drinking and driving, but **whether or not a separate and lower standard, based upon a distinct age classification, can be used to determine whether or not a violation of LSA - R.S. 14.98.1 has occurred**." (Trial Court Page 3)

This is a criminal law. The issue is simply whether in this State certain activity will be deemed criminal for one class of *adults* and not criminal for another.

ARGUMENT

Under our constitution, Article I, Section 3, any law which discriminate against persons

on the basis of age is presumed to be unconstitutional.

The proposed violation of this Defendant's rights would have resulted from the application of two different standards, one lower one higher, of what constitutes ***criminal*** activity by two distinct groups of *adults*. This is a violation of fundamental due process and equal protection for all citizens regardless of age but specifically outlawed by Article 1, Section 3, the prohibition against age discrimination, of the Louisiana Constitution.

Thus it is the guilt or "criminality" which must be evenly applied to any *adult* doing the same thing as another *adult*. To make one *adul*t, age seventeen to twenty a criminal, but relieve all other adults, age twenty-one to ninety-nine for any responsibility although doing the exact same thing - is as clear a violation of that person's equal protection rights as could be, as well as unquestioned discrimination in violation of Article 1, Section 3.

Therefore, no court should ever even consider allowing the State the opportunity to come forth with any rational basis for a criminal law resulting in such a flagrant constitutional violation. Said caveat in Article 1, Section 3 applies only to questions of privileges such as driving, drinking or gambling - but not ***criminality***.

In the words of the District Court:

> "This court will not penalize an eighteen year old (or nineteen or twenty year old as far as that goes) citizen….. by subjecting him to a criteria significantly different and much more punitive than a twenty-one year old fellow citizen when it comes to drinking and driving."

Punishment!

The brief of the State, as well as that of Amicus Curie actually addresses ***punishment*** rather than guilt. As to punishment the issue is completely different. Clearly the legislature, through the courts, has the right to determine different punishment for specific individuals found guilty of crime, in an effort to deter future crime. That is why juveniles receive suspended sentences and possibly " reform school" for a limited time, when an adult doing the exact same act is sent to prison. It is why a jury, having found two individuals committed murder (applying the same criteria to both in deciding their guilt) nevertheless verdicts that

one live and one die. It is the trial judge who gives two burglars (having been convicted of doing the same burglary) different sentences - one a suspended sentence and the other, a multiple offender, twenty years.

Clearly the punishment must fit the crime and the punishment must fit the individual if the system is to work.

But, again, this is as to ***punishmen***t and not in the ***determination of guilt*.** The criteria must be the same for all. Criminality must be non-discriminatory. Punishment happens only after a determination of guilt but that determination of guilt must be on the same criteria for all *adults*.

The Twin Brothers:

By example, let us assume that there are twin brothers, born fifteen minutes apart and celebrating their twenty-first birthday. Both consume, legally, the same amount of alcoholic beverages to render them a .02% B.A.C. reading. Midnight arrives making one 21, but there are fifteen minutes left for the other, and they each drive away in separate cars. Assuming a legal stop, the older brother, now twenty-one test out at .02 and has violated no law. But the younger brother, only twenty, who also test .02 per cent, is determined a criminal. The same acts, the same evidence, but a different result - only because of an age difference between these two adults - in fact a difference of only fifteen minutes!

Age Sensitive Traffic Laws:

Likewise, this court allow would not let stand very long, a law that said older people, 75 and above, would be speeding if they drove their automobiles over 55. Is there any question of the availability of a tremendous amount of statistical evidence, which all of us know to be credible, that older persons' thinking are slower, that they are more prone to suffering from Alzheimer, heart disease, hardening of the arteries, or be on viagra, such that their reaction times, their stopping distances, their perception, is different - all to the point that we simply won't let them drive over 55 mph even though other *adults*, younger than 75, can proceed on the same highway at 65 mph. Such laws have regularly been struck down and this Court would not allow same, even if there are obvious and well know "rational" reasons for the law

Yet the same type of discriminating law exists on our law books in the form of R.S.

14:98.1. That law, the State says, is based on the premise that *adults* who are seventeen to twenty don't know how to drink, don't know how to drink and drive, are a high accident category and, therefore, the legislature deems that if they drive at .02 to .09 per cent they should

be taken off the highways as criminals - while adults who are older, 21 to 99, can do the same at their leisure and pleasure. This court should strike down that law, as did the trial judge, with swift action.

We are, therefore, not at odds with the Attorney General, nor even the brief by Amicus Curie, as citing the legislature's intentions at addressing the problems of drinking by young adults, however, said address cannot be via an unconstitutional criminal law or by legislation which offends common sense and intellect

If .02 to .09 per cent is determined to be a "dangerous intoxication" then it is a "dangerous intoxication" for any adult at that level, not only those seventeen to twenty-one. Making the criteria of guilt universal address, in **punishmen**t, efforts to aid younger people by such mandates as: denying them driving privileges until they're twenty-one, making them take more intensive, longer lasting and more impressive schools, making them do impressive and more worthwhile public service, lecturing, et cetera, virtually anything and everything that the legislature would deem appropriate and worthwhile, while at the same time, relieving all those twenty-one and above, the "experienced drinkers/drivers" from any such obligations if seen fit.

To put it most drastically, it does not make a difference as to the constitutionality of this statute whether it provided for zero fine and zero punishment of any kind as compared to the normal punishment that we know for individuals above twenty-one. It is simply its determining that certain acts are criminal if done by one age group but not criminal when performed by another - that should be all that is necessary to be said for any court to sustain the District Judge's striking down this statute.

RATIONAL BASIS - .02% is not "intoxication"

Before proceeding further the Defendant must raise an issue not needed to be addressed by the District Court, for the statute was correctly ruled invalid under other proper grounds,

but one that goes to the very heart of this law..

This law says that .02% to .09% B.A.C. *is* "***intoxication***

> A. The crime of **underage operating a vehicle while *intoxicated* *is*** the operating of any motor vehicle…..when the operator's blood alcohol concentration is ***.02 percent or more***…if the operator is under the age of twenty-one…." (Emph. Supp)

5.

Not only did the State fail to submit any evidence whatsoever of any logical or scientific basis that .02% to .09% is "intoxication" - but none exist. We have all known for years that "intoxication" is presumed only at .10%, **not before**. On could be under the "influence", prohibited by 14:98 (A)(1)(a), but such a provision is not found in 98.1 only "intoxication" = .02% to .09%!! Even the legislature of this state cannot change medical, scientific and logic!

It stands to reason that before a governmental agency could ever offer a rational basis for a law, that the law itself must at least be rational - make some sense. This one does not - plain and simple.

Either .10% is intoxication (14:98) or .02% - .09% is (14:98.1)

NOT BOTH!

.If this court nevertheless would permit the State, under the caveat to Art. I, Section 3, to attempt to show some rational basis, then under our constitution, the State must

1)show forth a ***legitimate*** interest or purpose for treating that class different from any other age group - **AND** -

2) They must show that this approach ***substantially*** helps the achievement of that purpose. ***Sibley vs Board of Supervisors of LSU, 477 So.2d 1094 (La. 1985).***

The State makes its argument in two modes, one having to do with "highway safety" and the other the "welfare" of underage drinkers. The Amicus Curie brief argues federal mandate ($$$).

HIGHWAY SAFETY:

Again, the issue before this Court is not the driving privileges, nor the privilege to drink alcohol beverages, as in **Manual vs State, 95-2l89 (LA. 3/8/96), 692 So.2d 320**, nor any *privilege* but the constitutionality of a ***crimina***l law.

At the hearing on the Motion to Quash, the State presented no evidence, but instead, by proffer sought to introduce only the "statistics" presented in the *Manuel* case, which do not apply to the age classification here at issue and, thus, are useless statistics which do not carry the State's burden.

6.

Again, the Manuel case, had to do with a privilege, not a right, but nevertheless those statistics, offered no support for the State. Instead, as to the particular age classification that 14:98.1 adopts, the statistics are against rationalizing this very classification. Quoting from the State's brief to the trial court:

> "Recent statistics have shown that alcohol-related fatalities of young drivers increase significantly at age seventeen, then ***peeks*** at age twenty . . ."(emph. Supp)

If it is **peek**s at age twenty then one must assume that after that it only begins to go down, how significantly we don't know, at ages 21, 22, 23, 24, and so on. What are the statistics for those age groups? They were never offered by the State!

The statistics cited as being from the National Highways Safety Administrative Report (?) covered only eighteen to twenty year olds and not those 21 to 22, or 21 to 23, and so on.

Those statistic cited as coming from the Louisiana Traffic Records Data pertained to ages 15 to 24, and, therefore, are likewise of no use to the Court. It is the burden of the governmental agency, here the State, to show a rational basis and this they did not do.

In a somewhat bold summary, but without any factual basis whatsoever, the State says, at the middle of page 4 of its brief:

> "Statistics aside, there is an intuitive understanding that underage drinkers must be subject to a separate system of prosecution, conviction and punishment."

The defendant would ask: "**an intuitive understanding**", by whom of what?

She goes on to say that there is a "automatic analogy between the drinking age and this criminal statute. . .", a statement without any reasonable basis whatsoever.

Again, even if there were statistics to show that there is some higher percentage of accidents, et cetera, by individuals 17 to 20 (as compared to 17 to 22 or 22 or 23), and the exhibits offered by the State do not show that, that is not a rational basis for making these adults *criminals* but, instead, would be a rational basis for a statute providing a difference in ***punishmen***t once an *adult* is found guilty on the exact same criteria for all *adults*.

The State cites fifteen other States as having similar statutes to 14:98.1, but neglects the fact that *none* of those jurisdictions, and neither in the United States Constitution itself, is there the provisions of Louisiana's Art I, Section 3, prohibiting age discrimination.

7.

The State has failed in carrying its burden of proving a rational basis for a per se unconstitutional criminal law. Even should these statistics be taken as proving something they do not, this criminal law does not "substantially" advance any rational basis.

WELFARE OF UNDERAGE DRINKERS:

First, defendant takes offense at the use of the word "underage" because in Louisiana anyone seventeen and above is fully an ***adult*** as far as to criminal laws. It is to be noted that "minors" are not addressed in this statute whatsoever, as was the focus of the prior legislation, and, therefore presumably not deemed to have been in need of any "protection."

The Court examined the legitimacy of the State's purpose in holding only 17 to 20 year olds, all adults, to a lower standard of conduct for "their own protection" and welfare. The court found it difficult to understand how submitting them to a lower standard of criminal "guilt" than that required to convict any other adult of the same offense, resulted in any "protection," safety and welfare of that class. This argument could have some weight if the seventeen and twenty year olds were treated as minors, and their convictions would not be subject to publication, not be part of a criminal rap sheet or enhance a later penalty, or drive up their insurance cost

The State notes that "the last years of high school and the first years thereafter are highly volatile formative years in which young adults map their path of behavior for the future". Is it rational then to come up with a statute which makes them criminal at such a young and formative age for doing something that is not criminal for any other adult.

Surely the State does not argue that making criminals would "give them the assistance they need to prevent future alcoholism".

FEDERAL MANDATE:

In an Amicus Curie brief the drafter of this unconstitutional legislation actually argues in favor of a law that would make individuals, seventeen to twenty, criminals in order to get a bigger share of federal highway funds. He neglects, of course, to note that his same

legislature did not deny all individuals below twenty-one years of age the privilege of drinking, as virtually every other State in the union did,. and, therefore, lost a similar larger share of highway funds. At least that law would not make those persons criminals as this one does.

8.

Defendant notes with much interest, the erroneous statement of the Amicus Curie brief, when at p. 3, he says:

> "It is important to note that this statute punishes young drivers for driving under the influence of alcohol beverages rather than driving while intoxicated. Consequently, Judge Preston Aucoin was *mistaken* when in his Written Reasons for Judgment in the present case stated that 'this statutes under attack provides that for persons under the age of twenty-one, results indicating alcohol concentration of .02 to .09 will be <u>conclusive</u> evidence of intoxi-cation'."

Defendant would refer the writer to the statute itself which states quite plainly:

> "A. The ***crime*** of underage operating a vehicle while ***intoxicated"***

Further, as we pointed out at the beginning of our brief, the very documents given to the defendant at arrest specifically say that a .02 level will be "conclusive evidence that you are intoxicated".

Of the utmost importance Defendant points to the words of the "drafter" of this legislation, still at p. 3, when as he tells us what the "intention" of the legislature was, says:

> "***It was <u>not</u> the legislative intention of Act 1296 to change any presumptive levels of intoxication in the laws of Louisiana."***

But that is exactly what this law did do! - it gives the D.A. a "presumption of intoxication" at .02% , which, of course, could be one beer and, therefore, ridiculous.. This law's sole purpose was to lower the lever of the presumption of <u>intoxicatio</u>n from .10 down to .02 - .09%!

Therefore, in that the drafter of the legislation has just told use that what it does was not intended, this alone is sufficient reason to strike it down!!

.

Unlike the other jurisdictions having such laws, in Louisiana, it is not illegal for an 18 to 20 year old adult to possess and consume alcoholic beverages if for religious

purposes, when accompanied by a parent, spouse or legal guardian, for medical purposes, or at any private residence. *R.S.* 14:93.10. Therefore, the legislature, in its wisdom, did not deem it an unlawful activity for persons, such as this eighteen year old defendant, and all others between ages eighteen and twenty, to possess or consume alcoholic beverages

under such conditions.

As the Trial Court noted:

> "The State's argument that it is protecting citizens under twenty-one years of age by looking out for their welfare, totally fails to relate to the actuality of making a citizen under twenty-one years old suffer criminal consequences for conduct that is not necessarily criminal when committed by a person that is as little as one day older at the age of twenty-one.
>
> " The State offers no other compelling reason than protection of those under twenty-one for the age discrimination, and this court knows of none. It simply argues that it is substantially furthering the government objective of protecting the public from under twenty-one year old drivers. The court does not buy that argument and rejects it. **Why doesn't it protect the public from twenty-one year old and older drivers by reducing their .l0 blood alcohol concentration from .10 to .02** (Trial Court's Decision Page 4) (Emphasis Supplied)

To point to the fact that "other states have done it" which states do not have the mandated age discrimination protection that our Louisiana Constitution does, nor do they permit persons 18 - 20 to possess or consume alcoholic beverage as we do, or to point to statistics which are about 15 to 24 year olds and not this discriminated against age group, 17 to 20, - tells us nothing. Such a law making only one class of citizens criminal should not be allowed to stand, and perhaps so only on evidence that is crystal clear - and the evidence here is not. The State totally failed to carry its burden.

The Trial Court correctly ruled:

> "There's been no showing by the State that those below twenty-one years of age will be 'protected' by criminalizing the intake of lesser amounts of alcohol than necessary to convict a twenty-one year old or older person."

SUMMARY

The issue is not drinking age, driving privileges and surely not the money the state

can get from the federal government. It is, simply put - is it constitutional for a criminal

law to provide that one class of adults be found guilty of crime for acts which all other class of adults would not be.

The decision of the trial court striking down LSA R.S. 14:98.1 as unconstitutional should be affirmed as written.

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VERIFICATION

STATE OF LOUISIANA

PARISH OF EVANGELINE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

A. BRUCE ROZAS,

who, being duly sworn, deposed and said:

That he is counsel of record representing Joseph Davis Ferris, defendant-appellee, in the foregoing Appeal;

That he has prepared and read said Appeal and that all allegations contained therein are true and correct;

That copies of this Appeal were duly served upon the Honorable Preston N. Aucoin, Judge of the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana; upon District Attorney C. Brent Coreil, 13th Judicial District, Parish of Evangeline, State of Louisiana, Post Office Drawer 780, Ville Platte, Louisiana ; Richard P. Ieyoub, Attorney General, through Mary Ellen Hunley, Assistant Attorney General, Department of Justice, Criminal Division, 301 Main Street, 7th Floor, Baton Rouge, Louisiana 70802 and upon Reggie P. Dupre, Jr., State Representative, District 53, 7706 Main Street, Houma, Louisiana 70360, by mailing copies via United States mail, properly addressed, postage prepaid, on the _____day of November, l998.

_____

A. BRUCE ROZAS

SWORN TO AND SUBSCRIBED before me, this _____ day of November, l998.

_____

NOTARY PUBLIC