Giving Mental Culpability the Bird: How State v. Bird Secures the Presumption that Traffic Offenses are Strict Liability

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The Utah Supreme Court, in its recent opinion in *State v. Bird* (*Bird II*), 2015 UT 7, 345 P.3d 1141, has put to rest a decade's long error in Utah Traffic Code case law. Overturning prior Utah Court of Appeals precedent in *State v. Vialpando*, 2004 UT App 95, 89 P.3d 209, and *State v. Bird* (*Bird I*), 2012 UT App 239, 286 P.3d 11, the high court declared that traffic offenses are presumed to be strict liability.

Although issued without fanfare, *Bird II* is likely to be one of the most relevant supreme court opinions for the average Utahn this year. This opinion impacts all traffic cases, which constitute a large number of the cases filed in this state. Last year, there were 416,778 traffic cases filed in Utah district and justice courts. *See* Administrative Office of the Courts, *2015 Annual Report to the Community* 24–25 (2015). Traffic cases constituted 78.95% of the total 548,092 criminal cases filed and 42.84% of all cases filed in 2014. *See id*. In terms of population, about one traffic case is filed for every seven people. *See id*.; *State & County QuickFacts: Utah*, United States Census Bureau (Mar. 31, 2015, 3:14 PM), http://quickfacts.census.gov/qfd/states/49000.html. Accordingly, the supreme court's opinion in this area is worth an extra degree of consideration. But in order to appreciate the significance of the supreme court's holding in *Bird II*, it is helpful to review the background statutory framework and case law surrounding this issue.

Dueling Presumptions of Mental Culpability in Traffic Offenses

In 1973, the Utah Legislature enacted section 76-2-101 of the Utah Code, which set out the general requirement that crimes include a culpable mental state. As originally enacted, that section provided,

> No person is guilty of an offense unless his conduct is prohibited by law and:
>
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
>
> (2) His acts constitute an offense involving strict liability.

1973 Utah Laws 592. But not every statute in the criminal law provides a culpable mental state. Some of these silent offenses are intended to be strict liability – requiring no mental culpability – but most are not. So at the same time, the legislature also enacted section 76-2-102. That section provided a gap-filler mental-state requirement for silent statutes and created a strong presumption against strict liability. It provided,

> Every offense not involving strict liability shall require

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> a culpable mental state, and when the definition of the offense does not specify a culpable mental state, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability only when a statute defining the offense clearly indicates a legislative purpose to impose strict liability for the conduct by use of the phrase "strict liability" or other terms of similar import.

Id. Then, in 1974, the Utah Supreme Court held, on the basis of these statutes, that traffic offenses, like driving under the influence (DUI), require proof of a culpable mental state. *Greaves v. State*, 528 P.2d 805, 807 & n.5 (Utah 1974). And in construing the DUI statute, which was silent with regard to mental state, the supreme court applied the presumption and gap filler provided in section 76-2-102. *Id*.

But in 1983, the legislature superseded *Greaves* by explicitly excluding traffic offenses from the mental-state requirements upon which the supreme court had based its opinion. *See* 1983 Utah Laws 441–42; *Greaves*, 528 P.2d at 807 & n.5 (citing Utah Code Ann. §§ 76-2-101, -102 (1974)). The 1983 amendments added the Traffic Code exception to section 76-2-101. As amended, that section provided,

> No person is guilty of an offense unless his conduct is prohibited by law and:
>
> > (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
> >
> > (2) His acts constitute an offense involving strict liability.
>
> These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, [Traffic Code,] unless specifically provided by law.

1983 Utah Laws 441–42 (legislative format in original).[1] In the context of the supreme court's holding in *Greaves*, the legislative intent is powerfully clear: traffic offenses are different from mainstream criminal offenses; they are presumptively strict liability. The plain language of this exception is strong. "These standards…*shall not* apply…unless *specifically* provided by law." *Id*. (emphasis added). Thus, the legislature jettisoned the old presumption – that a mental state is required unless the words "strict liability," or something similar, appear – and adopted a new presumption that a traffic offense is strict liability "unless specifically provided by law." *Id*.

Twenty years later, in a case similar to *Greaves*, the Utah Court of Appeals considered the mental state required by the "actual physical control" element of the DUI statute in the Traffic Code. *State v. Vialpando*, 2004 UT App 95, ¶¶ 20–27, 89 P.3d 209. But despite the 1983 amendment, the court applied the same presumption that had been applied by the supreme court in *Greaves* – that traffic offenses require a culpable mental state under section 76-2-102.

In *Vialpando*, the court of appeals affirmed Mr. Vialpando's conviction for driving under the influence. *Id.* ¶ 1. On appeal, Mr. Vialpando alleged that the trial court improperly instructed the jury with respect to the "actual physical control" element of the offense of DUI. *Id*. ¶ 20. The DUI statute at the time provided,

> "A person may not operate or be in actual physical control of a vehicle within this state if the person: (i) has a blood or breath alcohol concentration of .08 grams or greater as shown by a chemical test

> given within two hours after the alleged operation or physical control."

Id. ¶ 21 (emphasis omitted) (quoting Utah Code Ann. § 41-6-44(2)(a)–(2)(a)(i) (1998)). Specifically, Mr. Vialpando argued that the State was required to prove the culpable mental state of intent to "be in actual physical control of a vehicle" in order to secure a conviction. *Id.* ¶ 24. The court rejected that contention. *Id.*¶ 26.

But having rejected intent as the required mental state, the court proceeded to identify what mental state the DUI statute required. *Id.* The court held that "because both [*State v. Bugger*, 483 P.2d 442 (Utah 1971), a supreme court case interpreting the DUI statute prior to the 1983 amendment,] and [the DUI statute] are silent concerning culpable mental state, a violation of the statute occurs when a person 'intentionally, knowingly, [or] recklessly' takes 'actual physical control' of a vehicle, while intoxicated." *Id.* (quoting Utah Code Ann. §§ 76–2–101(1), –102 (1999) (last alteration in original)). Thus, instead of beginning with the presumption that DUI is a strict liability offense pursuant to the Traffic Code exception in section 76-2-101, the court presumed that DUI requires a culpable mental state and filled in the missing mental state pursuant to section 76-2-102. The court's reasoning is found in footnote five, which states,

> Utah Code Annotated section 76–2–102 establishes that: "Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code Annotated section 41–6–44(2) prohibits a person with a blood alcohol concentration of .08 grams or more from operating or being "in actual physical control of a vehicle." Utah Code Ann. § 41–6–44(2) (1998). It does not, however, specify any culpable mental state; thus, the State is not required to prove that Vialpando intended to be in "actual physical control" of the vehicle.

Id. ¶ 26 n.5. Absent from the court's reasoning or citation is any reference to the Traffic Code exception. *See id.* Indeed, the court specifically cited subsection (1) of section 76-2-101 to the exclusion of the expressly applicable language that followed in the same section. Thus, without elaboration, the court failed to consider or apply the statutory presumption enacted by the legislature in 1983 and instead reverted to the presumption applied in *Greaves*. The court's failure in this regard was not an aberration.

Eight years later, in *Bird I*, the State cited the Traffic Code exception and argued to the Utah Court of Appeals that no mental state is required for conviction of a traffic offense. *State v. Bird*, 2012 UT App 239, ¶ 14, 286 P.3d 11. The court again rejected this presumption, reasoning that

> [d]espite the plain language of section 76–2–101, we do not necessarily agree with the State that section 76–2–101(2) [, the Traffic Code exception,] automatically removes the concept of mens rea from the entire Utah Traffic Code. We note that Utah Code section 76–2–102 contains the seemingly contradictory language, "Every offense not involving strict liability shall require a culpable mental state," Utah Code Ann. § 76–2–102 (2008), with no exception for offenses found in the Traffic Code.

Id. ¶ 15 n.4. But the court made no attempt to reconcile the apparent conflict it saw. The supreme court has held that in construing a statute, courts should "seek to render all parts thereof relevant and meaningful, and…accordingly avoid interpretations that will render portions of a statute superfluous or inoperative." *Hall v. Utah State Dept. of Corr.*, 2001 UT 34, ¶ 15, 24 P.3d 958 (citation and internal quotation marks omitted). Indeed, the supreme court has dictated that "when two statutory provisions conflict in their operation, the provision more specific in application governs over the more general provision." *Id.* In this case, the Traffic Code exception is certainly "more specific" to a traffic offense than the general notion that criminal offenses require a culpable mental state. Thus, the court of appeals did not apply long-standing supreme court precedent to what it perceived to be a statutory conflict and instead maintained the presumption that a traffic offense must include a culpable mental state.

Bird II Corrects the Presumption

The Utah Supreme Court's recent opinion in *Bird II* has righted the course of case law on this issue, declaring that "[v]iolations of the Utah Traffic Code . . . are strict liability offenses 'unless specifically provided by law.'" *State v. Bird*, 2015 UT 7, ¶ 18, 345 P.3d 1141 (quoting Utah Code Ann. § 76-2-101(2)).

In *Bird II*, the supreme court considered whether the trial court should have given an additional jury instruction regarding the mental-culpability implications of the words *receive* and *attempt*, as used in the failure-to-respond statute. *Id.* ¶ 13. Importantly, the supreme court began with the proposition that all traffic offenses

are presumed to be strict liability. *Id.* ¶ 18. But, because the State conceded that the words receive and attempt specifically provide a mental state requirement, the supreme court did not address why these terms rise to the level required to rebut the statutory presumption. The remainder of the supreme court's reasoning is directed to whether the mental states implicated by the words *attempt* and *receive* are clear enough for a jury to comprehend without additional instruction *Id.* ¶¶ 19–24.

But while the supreme court's analysis of the Traffic Code exception is cursory at best, it has important ramifications in the context of the court of appeals' analysis of that provision in *Bird I*. Where the court of appeals rejected the presumption dictated by the Traffic Code exception, the supreme court flatly accepted it. In so doing, the supreme court silently rejected the contrary ruling of the court of appeals in footnote 4. *Compare Bird II*, 2015 UT 7, ¶ 18, *with Bird I*, 2012 UT App 239, ¶¶ 14–15 & n.4. Similarly, the supreme court's application of the Traffic Code exception overrules the inconsistent reasoning in paragraph twenty-six and footnote five of the court of appeals' opinion in *Vialpando*, which applied the gap-filler mental-state requirement in section 76-2-102 to a silent DUI statute. *State v. Vialpando*, 2004 UT App 95, ¶ 26 & n.5, 89 P.3d 209. Thus, the supreme court's seemingly innocuous introduction to a discussion of a traffic offense's culpable mental state in fact has a substantial effect on traffic offenses because it changes the foundational presumption.

On the basis of the supreme court's pronouncement in *Bird II*, a court considering whether a traffic offense requires a culpable mental state must begin with the presumption that the offense is strict liability. *Bird II*, 2015 UT 7, ¶ 18. Then the court must determine whether the traffic offense at issue is one of those cases where a culpable mental state is "specifically provided by law." *Id.* (quoting Utah Code Ann. § 76-2-101(2)). And in making that determination, courts must look to the text of the statute defining the traffic offense because statutory law alone has the power to delineate the boundaries of an offense in this state. *State v. Gardiner*, 814 P.2d 568, 573–74 (Utah 1991) (citing Utah Code Ann. § 76-1-105).[2]

But *Bird II* leaves a critical question unanswered: What words in a traffic offense are sufficient indicia of legislative intent to trigger the "specifically provided by law" exclusion? Certainly the traditional language used to describe a culpable mental state

will suffice, including the terms *intentional, knowing, reckless, criminally negligent, willful, wanton,* and *malice*. *See* Utah Code Ann. § 76-2-103 (defining mental states for the Utah Criminal Code); Joshua Dressler, *Understanding Criminal Law* 121–36 (5th ed. 2009). But these terms appear relatively infrequently in the Traffic Code. *See* Utah Code Ann. § 41-6a-210 (criminalizing "willful or wanton disregard of [an officer's] signal"); *id.* § 41-6a-404 (criminalizing the act of giving information in an accident report that the person "know[s] or ha[s] reason to believe" is false); *id.* § 41-6a-503 (enhancing a DUI conviction if the driver "operated the vehicle in a negligent manner"); *id.* § 41-6a-528 (criminalizing "willful or wanton disregard for the safety of persons or property"); *id.* § 41-6a-1106 (criminalizing the "negligent" operation of a bicycle). The more interesting issue going forward is what other terms add a mental-state requirement to a traffic offense. Because the State in its reply brief conceded that the terms *attempt* and *receive* added a mental-state requirement, the supreme court has not adopted any analysis for resolving this issue. *Bird II*, 2015 UT 7, ¶ 18.

The State's concession that the words *attempt* and *receive* carry mental-state implications led the supreme court to skip a critical threshold issue. The State could have made a persuasive argument that no mental state was required for a conviction under the failure-to-respond statute on the basis of the plain language of Traffic Code exception. Indeed, the State made that argument to the court of appeals. *State v. Bird*, 2012 UT App 239, ¶ 14, 286 P.3d 11; Brief of Appellee at 25–27, *State v. Bird*, 2012 UT App 239, 286 P.3d 11 (No. 20100538-CA). Pursuant to the Traffic Code exception, a mental state is not required "unless *specifically* provided by law." Utah Code Ann. § 76-2-101(2) (LexisNexis 2012) (emphasis added). The inclusion of the word *specifically* dictates that the language of an offense statute must do more than "supply" a mental-state requirement; it must do so in a manner that is "free from ambiguity." *Merriam-Webster's Collegiate Dictionary* 1001, 1198 (11th ed. 2012). Under the Traffic Code exception, the supreme court should have first considered whether the words *attempt* and *receive* unambiguously supplied a mental-state requirement. Then, it could determine whether that requirement was clear enough for the jury. Mr. Bird's thorough treatment of the threshold issue – ten out of twenty-four pages of his legal analysis – indicates that Mr. Bird thought the State had a viable argument on this point. *See* Brief of Respondent at 12–22, *State v. Bird*, 2015 UT 7, 345 P.3d 1141 (No. 20120906). But the supreme court never had – or at least never took – the opportunity to consider the threshold question because the State conceded the issue.

Going forward, a court determining whether a traffic offense has "specifically provided" a mental-state requirement must reconcile the tension between the language of the Traffic Code exception and the incomplete analysis of *Bird II*. Defendants will no doubt urge a broad reading of *Bird II* – effectively reading out the Traffic Code exception by finding that almost any traffic offense has "specifically provided" a required mental state. That would be a mistake. *Bird II* must be applied for what it specifically requires: that when a defendant is on trial for failure to respond, the "trial court [must] instruct the jury that [the defendant] must have knowingly 'received a visual or audible signal from a police officer' and must have intended 'to flee or elude a peace officer.'" *Bird II*, 2015 UT 7, ¶ 26. But *Bird II* is silent on the threshold issue – what language in a traffic offense is sufficient to "specifically provide[]" a mental state. *See id.* ¶ 18; Utah Code Ann. § 76-2-101(2). Accordingly, a court should first conduct statutory analysis of the traffic offense at issue, asking whether the language of the offense statute unambiguously supplies a mental-state requirement.

CONCLUSION

For the last decade, the Utah Court of Appeals has presumed that traffic offenses require a culpable mental state under section 76-2-102 of the Utah Code despite the explicit exclusion of Traffic Code offenses from the mental-state requirements in section 76-2-101(2). Paragraph eighteen of the Utah Supreme Court's recent opinion in *Bird II* has overruled this presumption. 2015 UT 7, ¶ 18. Pursuant to this pronouncement, a court must begin with the presumption that Utah traffic offenses are strict liability. But the supreme court failed to analyze the next question: What is required for a traffic offense to "specifically provide[]" a culpable mental state? Utah Code Ann. § 76-2-101(2). Courts and litigants will no doubt wrestle with this question. But the best answer is that it must do so unambiguously.

1. Subsection (1) of section 76-2-101 had already been amended that year. 1983 Utah Laws 431. Those changes are silently reflected in the later adoption of the Traffic Code exception. The whole section was subsequently amended in 2005 to its current form. 2005 Utah Laws 155. The 2005 amendments include removal of the personal pronoun *he* and an updated reference to the renumbered traffic code in Title 41, Chapter 6a of the Utah Code. *Id.*

2. Courts in this state have in the past applied the traditional *malum prohibitum* versus *malum in se* analysis to identify what crimes are strict liability. *See, e.g., State v. Larsen*, 2000 UT App 106, ¶ 25, 999 P.2d 1252 (citing *Peck v. Dunn*, 574 P.2d 367, 370 (Utah 1978)); *see also Black's Law Dictionary* 1045 (9th ed. 2009) (defining the term *malum in se* as "[a] crime or an act that is inherently immoral" and the term *malum prohibitum* as "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral"); *Staples v. United States*, 511 U.S. 600, 604–19 (1994) (concluding that an offense was not strict liability on the basis of the severe punishment); Joshua Dressler, *Understanding Criminal Law* 145–51 (5th ed. 2009) (describing the traditional analysis). But where criminal statutory law has expressly preempted common law, this analysis must take a back seat. *See State v. Gardiner*, 814 P.2d 568, 573–74 (Utah 1991) (citing Utah Code Ann. § 76-1-105).