1975

Utah v. William Coleman : Unknown

Utah Supreme Court

Vernon B. Romney; Attorney for Respondent.
Rita G. James; Attorney for Appellant.

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

WILLIAM COLEMAN,

Defendant-Appellant.

Case No. 10766

APPEAL FROM CONVICTION OF POSSESSION OF A DANGEROUS WEAPON BY A CONVICTED PERSON, ENTERED AGAINST DEFENDANT-APPELLANT IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, STATE OF UTAH

HONORABLE CALVIN GOULD, presiding

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OF THE STATE OF UTAH

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	)	
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	)	
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	)	

BRIEF OF APPELLANT

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- WILLIAM COLEMAN, Defendant-Appellant.	)	Case No. 10766

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appeal from defendant-appellants conviction of the crime of possession of a dangerous weapon by a convicted person.

DISPOSITION IN LOWER COURT

Defendant-appellant was charged with the crime of possession of a dangerous weapon by a convicted person. Trial by jury was waived and the case was heard before the Honorable Calvin Gould, Judge of the Second Judicial District Court, sitting in Weber County, Utah. Defendant-appellant was convicted as charged and sentenced to a term of not more than five years in the Utah State Prison. He is presently at liberty on bond pending appeal.

RELIEF SOUGHT ON APPEAL

Defendant-appellant respectfully requests this Court to reverse the aforesaid conviction on the grounds that application of the statute to him is ex post facto and that the statutory definition of the class of persons prohibited from possessing weapons is unconstitutionally vague; in the alternative, the defendant-appellant respectfully requests this Court to remand his conviction for sentencing as a misdemeanor in that either the weapon possessed by defendant-appellant does not fall within the statutory definition of a firearm or that said statutory definition is similarly unconstitutionally vague.

STATEMENT OF FACTS

William Coleman was charged with possession of a dangerous weapon by a convicted person, a violation of section 76-10-503, Utah Code Annotated, which statute was enacted in 1973 as part of the New Utah Criminal Code and which had no comparable provision in prior statutes. Subsequent to the filing of the information, and at the defendant's request, the state filed a Bill of Particulars indicating that the State was relying upon the defendant's 1969 conviction of assault with a deadly weapon in placing the defendant in the class of persons now prohibited from possessing dangerous weapons. At trial, the State put on evidence that on November 12, 1973, the defendant had had a rifle in his possession and that he was the same William Coleman as that shown by copies of Court records to have been convicted of assault with a deadly weapon on April 18, 1969, in Weber County, Utah. It was not shown what weapon

had been employed by defendant in the 1969 conviction.

POINT I

THE STATUTE UNDER WHICH WILLIAM COLEMAN IS CHARGED IS RETROSPECTIVE AS APPLIED TO PERSONS WHOSE STATUS ARISES FROM ACTS PRE-DATING THE EFFECTIVE DATE OF THE STATUTE.

At the time William Coleman was convicted of assault with a deadly weapon, the Utah Code provided that a person guilty of such offense was punishable by imprisonment in the State Prison for not more than five years, or a fine of not more than $1,000.00, or by both. Section 76-7-6, Utah Code Annotated, 1953. The 1953 Penal Code did not define deadly weapon nor did it prescribe any punishment for the offense other than that set out above. The code did, however, provide for certain collateral consequences of some types of convictions, as set out below:

> 76-1-17: Felonious misconduct in office forfeits office and disqualifies: The conviction of any state, county, city, town or precinct officer of a felony involving misconduct in office involves, as a consequence, in addition to the punishment prescribed by law, a forfeiture of his office, and, disqualifies him ever afterwards from holding any public office in this state.
>
> 76-1-36: Sentence for less than life - Suspends Civil Rights, forfeits private trusts and public offices - A sentence of imprisonment in the state prison for any term less than life suspends all civil rights of the person so sentenced during such imprisonment, and forfeits all private trusts and all public offices, authority or power.
>
> 76-1-37: Sentence for life - Prisoner deemed civilly dead. A person sentenced to imprisonment in the state prison for life is deemed civilly dead.

Applying all of these statutes to William Coleman, we find that on April 18, 1969, the state possessed the power to imprison him for not more than five years, to fine him not more than $1,000.00, to suspend his civil rights for so long as he was in prison and to remove him for any position of private trust or of public office, authority or power. It did not have the authority to forbid him from ever again owning or possessing a dangerous weapon. Now it is claimed by the state that a law enacted nearly four years later gives it that additional power. Clearly the statute in question is retrospective as applied to William Coleman; the issue is whether or not such a retrospective law is considered as ex post facto under either the United States or the Utah Constitutions. Article I Section 9 of the United States Constitution provides that "No Bill of Attainder or ex post facto law shall be passed," the following section prohibits states from passing any such laws. The Utah Constitution has a nearly identical provision in Article I, Section 18 which differs only by including a prohibition against laws impairing the obligations of contracts.

The usual starting point for any discussion of ex post facto laws is the early case of Calder v. Bull, 3 Dall 386, 390, 1 L.Ed. 648. There the United States Supreme Court set out four categories of laws deemed ex post facto:

> 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
>
> 2. Every law that aggravates a crime, or makes it greater than it was, when committed.

3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

4. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

An examination of the case law on this subject discloses no consistancy of decision whatsoever in applying these principals. In Hawker v. New York, 170 U.S. 189, 18 S. Ct. 573, 42 L.Ed 1002 (1889), the United States Supreme Court held in a bitterly divided opinion that the State of New York could, in 1893, legislate away the right of a doctor to practice his profession because he had been convicted of a felony in 1878. The majority felt that it was a valid exercise of the legislative power to protect the public by precluding felons from the practice of medicine and thus, though retrospective, the statute was not punitive in nature and not prohibited by the ex post facto clause of the Constitution. The dissenting justices opined that, if depriving a man of his livelihood was not punitive, then nothing was. The Hawker case has generally been followed and the Federal Gun Control Acts, passed following the death of President Kennedy, have been upheld by the Federal Courts as being valid exercises of the police power. United States v. Donofrio, 450 F. 2d 1054 (C.A. Florida); United States v. McCreary, 455 F. 2d 647 (C.A. Kentucky).

It has been held ex post facto to provide that a person whose term of imprisonment has been served in less than the stated period because of statutory "good time" must be transferred to parole status

rather than merely released. People of United States ex rel Umbenhower v. McDonnell, 11 F. Supp. 1014 (N.D. Ill. E.D., 1934). Laws dealing with parole have been sometimes held not retroactive on the theory a prisoner has no right to parole, Voorhees v. Cox, 140 F. 2d. 132 (CA. Mo.) while other Courts have held that anytime the rules are changed to the disadvantage of the defendant, the law is ex post facto. State ex rel Woodward v. Board of Parole, 99 So. 534 (Louisianna). The passage of a procedural statute permitting the joinder of defendants for trial under circumstances which would have required severance at the time of the crime has been held not ex post facto. Paul v. State, 483 P. 2d. 1176 (Okl. Cr. 1971). Again, on the other hand, reducing the number of trial jurors has been held unconstitutional when retroactive, Thompson v. Utah, 18 S. Ct. 620, 170 U.S. 343, 42 L. Ed. 1061.

More comparable to the situation here are the political cases which deal with statutes requiring oaths as to past loyalty or limiting the activities of members of the Communist Party of America. Such statutes have generally been attacked as being either ex post facto or, where that argument was not applicable, its highly analogous sister: a bill of attainder. Such laws have usually fallen in the face of this type of attack. United States v. Brown, 381 U.S. 437, 14 L. Ed. 2d. 484, 85 S. Ct. 1707 (1965). The pattern that emerges is that, if the reviewing court deems the social intent of the legislature to be desirable, then imposing a disability on an individual because of past conduct

will not be held ex post facto despite the retrospective effect. The United States Supreme Court has even enunciated such a principle as controlling; in Trop v. Dulles, 356 U.S. 86, 2 L. Ed. 2d. 630, 78 S. Ct. 590 (1958) the Court considered a statute which permitted a Court martial to strip a deserter of his citizenship. The statute was held unconstitutional; however, there was no uniformity among the justices as to the grounds of the decision. In the opinion of Mr. Chief Justice Warren, joined in by three of the four other majority justices, the subject of ex post facto laws was considered at length. The opinion stated that to come within this prohibition of the Constitution the law must be penal and that if the statute imposing disability because of past conduct has as its purpose some other legitimate government purpose, it will not be held penal despite the admittedly penal effect it has on the members of the proscribed class. Ibid, 2 L. Ed. 2d. at 639-40.

There is little authority on this point in Utah as State v. Carrington, 15 U. 480, 50 P. 526, which permitted a reduction in the number of grand jurors; and State v. Bates, 14 U. 293, 47 P. 78, a reduction in the number of trial jurors, were both cases dealing with procedure and both were overruled by implication when the United States Supreme Court reversed the decision of the Utah Supreme Court in Thompson v. Utah, supra, and held that the number of jurors was a serious right and could not be reduced as to offenses committed prior to the legislature making the change.

Although it is most probable that a federal court would not find Utah's new gun control law violative of the United States Constitution, the Utah Constitution remains to be considered in the light of the interpretations placed upon it by our Supreme Court. In People v. Flynn, 26 P. 1114 (Utah 1891) that Court considered whether or not a prisoner for felony could be tried while a prisoner. In holding that he could be so tried the Court considered the disabilities set out in Sec. 4749, Comp. Laws 1888, identical to our Sec. 76-1-36, Utah Code Annotated, 1953, and ruled that "...no consequence follow a conviction for felony except those declared by statute." Ibid, 1115.

The case at bar is one of first impression for this Court which must deal with the retrospective application of this statute in terms of the Constitution of Utah. Thus this Court has the option of determining that while the application of this statute to Mr. Coleman does not, according to the federal decisions in gun control cited herein, violate the United States Constitution, it is, nonetheless contrary to the Constitution of Utah.

In essence then, the principle to be determined here is whether or not the Constitution of Utah permits the legislature to add a disability because of a prior offense so long as the disability is socially desirable. Indeed, it may well be true that society is better off if William Coleman does not own a gun; however, the principle to be determined here goes far beyond the facts of this situation. If we follow the federal cases on gun control legislation, then we will be adopting

a principle which would also say that the Utah legislature could, for example, pass a statute which would forbid anyone from driving an automobile who has been convicted of speeding in the prior three years. That too might be socially desirable in the minds of some persons. Yet, obviously, it adds immeasurably to the consequences of a past event even though it does not, technically, increase the fine or other punishment.

POINT II

THE STATUTE UNDER WHICH THE DEFENDANT IS CHARGED IS FATALLY VAGUE AND THEREFORE, ANY CONVICTION BASED UPON SAID STATUTE WOULD BE VIOLATIVE OF DUE PROCESS.

Sec. 76-10-503, Utah Code Annotated, as amended, 1973, provides as follows:

> Any person who is not a citizen of the United States who has been convicted of any crime of violence under the laws of the United States, the State of Utah, or any other state, government, or country, or who is addicted to the use of any narcotic drug, or any person who has been declared mentally incompetent shall not own or have in his possession or under his custody or control any dangerous weapon as defined in this part. Any person who violates this section is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed off shotgun he shall be guilty of a felony of the third degree.

In order to determine whether or not one comes within the class of those convicted of any crime of violence, it is necessary to refer to Sec. 76-10-501 (5), Utah Code Annotated, 1973, which defines "crime of violence" as follows:

> "Crime of violence" means murder, voluntary manslaughter, rape, mayhem, kidnapping, robbery, burglary, housebreaking, extortion, or blackmail accompanied by threats of violence,

> assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable by imprisonment for more than one year, or an attempt to commit any of the foregoing offenses.

Clearly, from this definition, some acts which are crimes of violence in the ordinary sense of the word (ie., stricking another with a fist) are not crimes of violence, while other acts, which are frequently done in the utmost peace and quiet (ie., burglary and housebreaking) are so classified. Some of the offenses proscribed are felonies while others may be misdemeanors. The evidence against the defendant shows a conviction in 1969 for assault with a deadly weapon with intent to do bodily harm. This is not one of the enumerated crimes of violence; however, the state would have us consider it to be the same thing as 'assault with a dangerous weapon.' There is not now, nor has there ever been, an offense in this state known as 'assault with a dangerous weapon.' Since no such crime has existed, it is not possible to compare the elements of the defendant's crime with those of 'assault with a dangerous weapon;' moreover, the record does not reflect what weapon the defendant used in 1969 and so we cannot determine whether or not it comes within the definition of dangerous weapons given in 76-10-501 (1). By comparing the old and new assault provisions one can perceive great differences between what conduct constituted assault under 76-7-1, Utah Code Annotated, 1953, and that which may now be denominated assault under 76-5-102, Utah Code Annotated, 1973. Which definition are we to apply in determining whether or not, in 1969,

William Coleman committed an assault with a dangerous weapon? The common-law definition is of no avail since the legislature specifically abolished common law crimes and provided that no act could be considered a crime unless the conduct was so classified by statute or ordinance. Sec. 76-1-105, Utah Code Annotated, as amended, 1974. Thus merely determining whether or not one comes within the proscribed class of persons requires, in many cases, a labyrinthine search through the present and past criminal codes and, even then, is subject to uncertainty.

The Utah Supreme Court dealt with a similar problem in State v. Shondel, 22 Utah 2d. 343, 453 P. 2d. 146 (1969). In that case the legislature had enacted overlapping statutes. Shondel was charged with a violation of the Drug Abuse Control Law which provided as punishment for his violation not more than one year imprisonment and/or a fine of not more than $1,000.00, or both. This law also provided, however, that if an offense covered therein was also covered by any other law, then the provisions of the latter would apply; the latter, the simultaneously enacted Narcotic Drug Act treated the same offense as a felony. Thus, in order to discern the legislated punishment, one had to persue the entire Drug Control Law, find the provision referring to "other law" and then search throughout the existing laws of Utah to find the provision in the Narcotic Drug Act. In ruling that imposing the felony punishment would be a denial of due process and equal protection of the laws, the Utah Supreme Court stated as follows:

> "The well-established rule is that a statute creating a crime should be sufficiently certain that persons of ordinary intelligence who desire to obey the law may know how to conduct themselves in conformity with it. A fair and logical concomitant of that rule is that such a penal statute should be similarly clear, specific and understandable as to the penalty imposed for its violation."

Section 76-10-503, U.C.A. 1973, is thus so void and vague that "persons of ordinary intelligence who desire to obey the law" are totally incapable, in many cases, of determining whether or not they are a "restricted person". Depending on the individual situation, an individual who suspects he may be included in the class of restricted persons must compare statutes which bear no relation to the Utah Criminal Code to the offenses enumerated in Section 76-10-501 (5) and is called upon to render a judgment as to whether or not they are the same. This process resembles nothing so much as comparing apples and oranges. Since we have no common law crimes, may we define these offenses according to their common-law definition? Is burglary of an auto, which was not burglary at common law, once was burglary under our Penal Code, and is now a separate offense and a Class A misdemeanor, burglary within the meaning of this provision? Is trespassing, when in a residence, housebreaking; an interesting question since, like assault with a dangerous weapon, a crime by that name is unknown to our law. The difficulties of interpretation presented by this statute are immense, not only in the case at bar, but in virtually half of the possible situations that might come within the definition. We cannot expect William

Coleman, or any other citizen, to be able to determine whether or not he or she falls within this class. The enforcement of this statute is clearly repugnant to the requirements of due process and equal protection of the laws.

POINT III

THE DEFENDANT CANNOT BE CONVICTED OF A FELONY SINCE THE STATUTE FAILS TO MAKE CLEAR WHICH OF THE TWO PUNISHMENTS PROVIDED THEREIN IS APPLICABLE TO THE ACCUSED.

Further ambiguity is provided us by the provision that illegal possession of a dangerous weapon is a class A misdemeanor unless the weapon is "a firearm or a sawed-off shotgun," in which case it is a third degree felony. Prior to reading the statutory definition of "firearm" given by legislature in Section 76-10-501 (2), U.C.A. as amended, 1974, most persons would undoubtedly think they knew what a firearm was. The statutory definition, however, is as follows:

> "Firearms" means pistols, revolvers, sawed-off shotguns, or sawed-off rifles, and/or any device that could be used as a weapon from which is expelled a projectile by any force.

Since the weapon defendant possessed was a rifle we must now consider whether or not a rifle is a firearm within the meaning and intent of this definition. Clearly a rifle is neither a pistol, revolver, sawed-off shotgun or sawed-off rifle. If the legislature had meant to include rifles, or for that matter, shotguns, as firearms, it would not have been necessary to specify, and later in section

76-10-501 (3), define the sawed-off variety. Equally clear, a rifle is by its nature always a weapon and is therefore not merely a "device that could be used as a weapon." (emphasis added)

An examination of all statutes in Part 5 of Chapter 10 of the Penal Code provides further indication that the term "firearm" as defined by legislature in that part was not intended to include rifles but the legislature was by no means, consistant. The following examples of this inconsistancy aptly demonstrate the problem.

Section 76-10-502 defines a loaded "weapon" as being "any pistol, revolver, shotgun, rifle or other weapon described in this part..." Nowhere is the word "firearm"used. If rifles and shotguns were firearms there would have been no need to specify the types of weapons but the statute would merely have said that a firearm would be deemed loaded under the circumstances set out therein.

Both Sections 76-10-503 and 504 increase the degree of offense when the weapon is a "firearm or sawed-off shotgun." Since 76-10-501 (2) specifically defines a sawed-off shotgun as a firearm there seems to be no purpose at all for this phraseology.

Section 76-10-505 prohibits carrying a loaded firearm in certain places without further elaboration on what is or is not a firearm.

Section 76-10-506 is really a curious statute; entitled "Brandishing firearm or using firearm in quarrel," the substantive

portion of the statute says not one word about firearms or any type of gun but only a "dangerous weapon," which could be a knife or just about anything else.

Section 76-10-507 prohibits discharging "any kind of firearm" from a vehicle. The use of the phrase "any kind" seems to indicate an intent to cover firearms not included in the statutory definition of the term.

Additional confusion is supplied by the fact that the part defines a sawed-off shotgun or rifle with great particularity and separately from the firearm definition but never once treats these weapons as any different from firearms in general. Thus the entire five line definition seems to serve no purpose whatsoever.

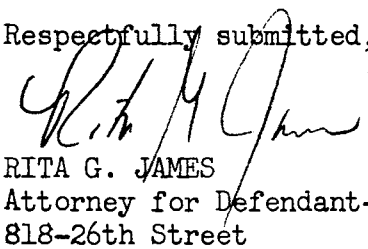
A rifle is clearly a dangerous weapon within the definition of Section 76-10-501 (1). Thus, if this statute is upheld as constitutional this defendant cannot be convicted of a felony. As was clearly enunciated by the Utah Supreme Court in Shondel, supra, "...where there is doubt or uncertainty as to which of two punishments is applicable to an offense, an accused is entitled to the benefit of the lesser."

CONCLUSION

The application of Section 76-10-503, U.C.A., as amended, 1973, to this defendant is forbidden by the prohibition of the Utah Constitution against ex post facto laws. It is, additionally, so vague in defining the class of restricted persons that enforcement of the

statute against anyone not clearly within its scope is violative of due process and the right to equal protection of the laws. The punishment provision of the statute similarly fails to clearly include rifles and thus the defendant cannot, in any case, be punished as for a felony.

Respectfully submitted,



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