2000

Vivian Allgood v. Delmar Larson, The City of Salt Lake : Petition for Rehearing

Utah Supreme Court

Stephen R. McCaughey; Salt Lake Legal Defender Association.
Roger F. Cutler; Paulg G. Maughan; Attorneys for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

VIVIAN ALLGOOD,

Plaintiff-Respondent,

vs.

DELMAR LARSON, Sheriff of Salt Lake County and THE CITY OF SALT LAKE,

Defendants-Appellants.

Case No. 14094

PETITION FOR REHEARING

STEPHEN R. McCAUGHEY
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah 84102

ROGER F. CUTLER
Salt Lake City Attorney

PAUL G. MAUGHAN
Assistant City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Attorneys for Defendant-Appellant
Salt Lake City, Utah

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

TREATISE

IN THE SUPREME COURT OF THE STATE OF UTAH

VIVIAN ALLGOOD, Plaintiff-Respondent, vs. DELMAR LARSON, Sheriff of Salt Lake County and THE CITY OF SALT LAKE, Defendants-Appellants.	)	Case No. 14094

PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE STATE OF UTAH:

Appellant, Salt Lake City Corporation, respectfully petitions the Court for a rehearing on its opinion filed in the above-entitled cause on the 12th day of January, 1976. The grounds for this Petition and the points wherein the appellants allege this Court has erred are as follows:

1. The controlling opinion ignores the Legislature's specific grant of authority to municipalities to punish the offense of trespass as set out in section 10-8-50, Utah Code Annotated 1953, and cites as supporting authority for its holding a general statement of law based on statutory enactments entirely contrary to the statutory provisions of the State of Utah.

2. The controlling opinion is inconsistent with the legislative intent of the State Penal Code and the municipal powers specified in Title 10 of the Utah Code Annotated 1953, and previous case holdings of this Court.

ARGUMENT

POINT I

THE CONTROLLING OPINION IGNORES THE LEGISLATURE'S SPECIFIC GRANT OF AUTHORITY TO MUNICIPALITIES TO PUNISH THE OFFENSE OF TRESPASS AS SET OUT IN SECTION 10-8-50, UTAH CODE ANNOTATED AND CITES AS SUPPORTING AUTHORITY FOR ITS HOLDING A GENERAL STATEMENT OF LAW BASED ON STATUTORY ENACTMENTS ENTIRELY CONTRARY TO THE STATUTORY PROVISIONS OF THE STATE OF UTAH.

The controlling opinion of the Court is based upon the premise that Salt Lake City has based its trespass ordinance solely upon the implied powers granted to cities and towns by the Legislature in Section 10-8-84, Utah Code Ann. 1953. The opinion cites authority and case law in support of its holding that those implied powers of cities and towns, which are not reasonably necessary in carrying out their express duties, are denied them.

The controlling opinion cites *Lark v. Whitehead,* 28 Utah 2d 343, 502 P.2d 577 (1972) and *Nasfell v. Ogden,* 122 Utah 344, 249 P.2d 507 (1952) for the proposition that:

> "Cities have none of the elements of sovereignty and that any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation (city) and the power denied; grants of power to cities are strictly construed to the exclusion of implied powers which are not reasonably necessary in carrying out the purposes of the express powers granted."

With this reasoning the city finds no fault in applicable and relevant areas. However, in the instant case the controlling opinion ignores the legislative grant of authority of Section 10-8-50, Utah Code Annotated that specifically enables the city to do the very thing that the controlling opinion states the city does not have the implied power to do. In this section the Legislature of the State of Utah specifically granted municipalities the power to:

> "Provide for the punishment of trespass . . . as the Board of Commissioners . . . may deem proper."

This Court has, on numerous occasions,held that the general powers spoken of in Section 10-8-84 Utah Code Ann. 1953 are limited to those powers specifically granted to cities and towns within the chapter. As has been shown, the power to punish the offense of trespass is a specific grant of power "within the chapter" to be punished as deemed proper by the Board of Commissioners within the limitations set by Section 10-8-84 Utah Code Ann. 1953.

The controlling opinion also cites in addition to the case law cited above, a brief portion from McQuillin that is based on this same premise of "insufficiency of implied powers." The inapplicability of this particular citation is made clear in light of the specific provisions of Section 10-8-50, and by looking at McQuillin in full context as pointed out by Justice Crockett in his dissenting opinion. McQuillin states:

> "In some instances an ordinance that covers an offense denounced by statute must, *in the absence of authorization to impose a different penalty,* prescribe the same penalty as the statute. In other words, if the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance is void. The charter or ordinance penalty cannot exceed that of the state law." (Emphasis added.) 5 McQuillin, *Municipal Corporations,* §17.15 p. 326 (3rd Ed.)

Section 10-8-50 Utah Code Ann. 1953 does contain the express authorization to enact the same or different penalty as prescribed by state law, and therefore the ordinance does not conflict with state law, but is based wholly upon it and is consistent therewith. McQuillin goes on to clarify this point by stating the position of the law in states such as Utah where there is a specific enabling grant from the legislature:

> "Where the unlawful act may be an offense against both the state and the municipal corporation decisions exist to the effect that the penalty of the ordinance, where it is not otherwise limited to such extent, may be greater than that provided in the state statute . . . *Clearly, of course, a statutory penalty may be exceeded or increased by the penalty of an ordinance where power to impose such penalty by ordinance has been expressly given.*" (Emphasis added.) 5 McQuillin, *Municipal Corporations,* §17.15 p. 328, 239, (3rd Ed.)

Such is the case in the present instance.

POINT II

THE CONTROLLING OPINION OF THE COURT IS INCONSISTENT WITH THE LEGISLATIVE INTENT OF THE STATE PENAL CODE AND THE MUNICIPAL POWERS SPECIFIED IN TITLE 10 OF THE UTAH CODE ANNOTATED, AND PREVIOUS CASE HOLDINGS OF THIS COURT.

The controlling opinion of the Court implies that the new Penal Code expressly pre-empts the enforcement of all other criminal offenses which are provided for outside of the new Penal Code. However, Section 76-1-103(1) Utah Code Ann. 1953, which deals with the scope and applicability of the Penal Code provides:

> "The provisions of this code shall govern the construction of, the punishment for and defenses against any offense defined in this code or, *except where otherwise specifically provided* or the context otherwise requires, any offense defined outside this code;" (Emphasis added.)

The city maintains that Section 10-8-50 Utah Code Ann. constitutes a legislative enactment which is "otherwise specifically provided" for outside of the Penal Code as are the rest of the specific powers granted by the Legislature to municipalities to deal with misdemeanors. By inserting the language "except where otherwise specifically provided or the context otherwise requires" in the section of the code dealing with the Penal Code's application, the Legislature manifested its intent not to emasculate the enabling powers granted to cities and towns to provide for misdemeanor offenses. Further, it was not the intent of the Legislature to make all of the ordinances of cities and towns subject to the State Penal Code. To hold otherwise would be to render meaningless the powers of Title 10 dealing with the powers and duties of cities and towns, a situation that was never intended or contemplated by the Legislature of the State.

The controlling opinion of the Court holds that Salt Lake City's trespass ordinance is in conflict with State law. In making such a determination the opinion fails to apply the test that has been adopted by this Court for determining whether or not an ordinance is in conflict with State law. This test is cited in *Salt Lake City v. Allred,* 20 U.2d 298, 437 P. 2d 434 (1968) and *Salt Lake City v. Kusse,* 97 U. 113 93 P.2d 671 (1939) and restated in the dissenting opinion of Justice Crockett:

> "The test whether an ordinance is repugnant to or in conflict with state law is not whether it deals with the same subject matter in a different manner by providing a different penalty, but it is whether the ordinance permits or licenses something which the state statute forbids or prohibits, or vice versa. (Cases cited therein.)
>
> "The ordinance here in question does not authorize what the state law has forbidden, nor does it forbid what the state law has authorized. It is therefore my opinion: that the ordinance is within the authority granted to the city and the responsibilities it is enjoined to carry out; that it is neither repugnant to nor inconsistent with other existing law, but is supplementary thereto; and that therefore it should not be declared void.

Salt Lake City's trespass ordinance is consistent with and conforms to this long-adopted and approved test. The court should, therefore, apply this test and the above-cited decisions in the instant case.

The controlling opinion cites *Smith v. Hyde,* 97 Utah 280, 92 P.2d 1098 (1939) in support of its decision that the City's trespass ordinance conflicts with state law. In *Smith* a Tremonton city ordinance was held to be in conflict with State law. That case was correctly decided and is easily distinguished from the instant case. In *Smith* the State Legislature, through specific enabling power, had granted cities and towns the power to impose jail sentences for unpaid fines at the rate of one day for each $2.00 of an outstanding fine. The city of Tremonton's ordinance conflicted with this specific grant of enabling power in that it provided that only $1.00 of an unpaid fine was to be satisfied for each day of incarceration.

To find *Smith* applicable to the instant case, Salt Lake City would have had to have violated or exceeded the limitations set by the Legislature of a specific enabling power such as imposing a fine greater than $300.00 or imposing a jail sentence of longer than six months. This the city clearly has not done, but it has acted within the specific legislative grant of authority under the enabling powers of cities and towns.

CONCLUSION

The petitioner has shown that the Legislature has given a definite and specific grant of authority enabling the city to provide for the punishment of trespass by imprisonment. This specific enabling power, found in Section 10-8-50, Utah Code Ann. 1953, was expressly exempted by the Legislature from falling under the purview and application of the State Penal Code by Section 76-1-103(1). If the existing case law of this State, determining whether a city ordinance is in conflict with a State statute, were properly applied in the instant case, Salt Lake City's trespass ordinance would be shown not to be in conflict with State law. This is especially so in light of the specific enabling power of Section 10-8-50. Petitioner has further shown that some of the authorities cited in the controlling opinion do not accurately reflect the true intent of the Legislature nor the true state of the law in Utah. A decision should therefore be rendered in the instant matter consistent with the specific

statutory enactments of the Legislature of this State and previous holdings of this Court, and the recognized authorities of municipal law upholding the petitioner's right to punish the offense of trespass by imprisonment.

RESPECTFULLY SUBMITTED,

ROGER F. CUTLER
City Attorney

PAUL G. MAUGHAN
Assistant City Attorney
101 City and County Building
Salt Lake City, Utah 84111

Attorneys for Defendant-Appellant