1986

Utah v. Thompson : Petition for Rehearing

Utah Court of Appeals

David L. Wilkinson; Attorney General; Stephen J. Sorenson; Richard M. Hagstorm; David J. Schwendiman; Robert N. Parrish; Stanley H. Olsen; Assistant Attorneys General; Attorneys for Respondent.

John F. Clark; Sessions & Moore; Attorney for Petitioners.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Respondent,	:	
vs.	:	No. 860357-CA
MICHAEL C. THOMPSON and BRUCE A. CONKLIN, Defendants-Appellants.	:	

APPELLANTS' PETITION FOR REHEARING

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY,
HONORABLE JUDITH M. BILLINGS, JUDGE

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APPELLANTS' PETITION FOR REHEARING

Appellants, Michael C. Thompson and Bruce A. Conklin, petition this Court for a Rehearing for the reason that this Court has misapprehended Utah Code Ann. § 76-10-911 et seq. (1985) (Utah Antitrust Act) and the good faith exception to the exclusionary rule as it applies to the facts of this case.

ARGUMENT

APPELLANTS' ANTITRUST CONVICTIONS SHOULD BE REVERSED

This Court's modified definition of "group boycott" is in contravention of the expressed legislative intent that the Utah Antitrust Act is to be construed in accordance with "interpretations given by the federal courts to comparable federal antitrust statutes . . . ." Utah Code Ann. § 76-10-926 (1985).

As this Court noted, the classic definition of "per se group boycott" is a situation in which "two or more competitors on the same level of the market structure agree to eliminate a target horizontal competitor by combining to deny the target of elements needed in order to compete." Opinion at 9.

This Court also recognized that the instant case does not present the classic per se group boycott situation. Opinion at 11. This Court turned away from the established group boycott definition and analysis and replaced it with a much broader approach. Appellants assert that there is no apparent legislative intent to modify the traditional definition of group boycott. Moreover, Appellants agree with Judge Orme's dissent that even under this Court's definition no group boycott existed in this case.

This Court adopted the following definition of group boycott: "a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." Opinion at 11-12. Appellants had no dispute with any party, either horizontally or vertically. No patronage or services were withheld, and no target existed. This Court apparently grouped all entities offering the services of security guards as the "target." Such a relationship is inimical to the term "target," which usually denotes "a person or business against which competitive aim is taken . . . ." Reaemco Inc. v. Allegheny Airlines, 496 F. Supp. 546, 552 (D.C.N.Y. 1980). Under the theory that all security companies were the

target of the alleged boycott, any such company in existence at the time could bring an action against Appellants for treble damages. Utah Code Ann. § 76-10-919 (1985). Certainly, such a result is not the intent of this Court.

This Court observed that several cases recognize per se group boycotts between a "single horizontal competitor and a vertically related company." Opinion at 12. Significantly, in each case cited (Cascade Cabinet Co. v. Western Cabinet Millwork, 710 F.2d 1366 (9th Cir. 1983); Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982); Corey v. Look, 641 F.2d 32 (1st Cir. 1981)) there was a specific identifiable entity which had been singled out as the "target" of the alleged boycotts. Appellants urge that the lack of any such target in the present case precludes the finding of a group boycott under this Court's definition, as well as under the traditional definition.

As explained by Judge Orme, commercial bribery is an offense which has been given its own punishment by the state legislature under Utah Code Ann. § 76-6-508 (1973). No legislative policy requires or provides that when such a bribe is offered to secure a contract, it results in a violation of the Utah Antitrust Act as well. A mere exclusive dealing arrangement violates neither federal nor state antitrust Law. Two Cities Sport Service, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1304 n.9 (9th Cir. 1982).

Appellants further urge that this Court mistakenly considered Utah Power & Light to be in and of itself the relevant market for purposes of group boycott analysis. While it is true that Utah Power & Light is the largest single employer of security services in Utah, it is neither the only such employer nor does it employ a majority of the area's security personnel. The market for security services is worldwide. The fact that Appellants were the only competitors to provide security services for Utah Power & Light for a period of time cannot rise to antitrust activity, even assuming the contract was obtained as a result of commercial bribery.

No evidence in this case suggests a potential for a restraint of trade in any significant market. If this Court declines a reconsideration of its opinion, a precedent will be set allowing an antitrust action in virtually any commercial bribery scenario.

This Court's opinion will have the additional effect of introducing doubt and uncertainty into the Utah Antitrust Act. The legislature apparently attempted to eliminate such uncertainty by particularly describing only four unlawful acts. See Utah Code Ann. § 76-10-920 (1985). The additional requirement of specific anticompetitive intent was correctly recognized by Judge Orme as a legislative attempt to narrow the scope of the group boycott crime. This requirement would avoid a conviction where a boycott exists without anticompetitive intent. This analysis

conforms to the longstanding rule that criminal statutes should be strictly construed. United States v. Wiltberger, 5 U.S. 76, 95 (1820). This Court's opinion not only expands the scope of the group boycott crime but also blurs the bright line between criminal and noncriminal conduct drawn in the Utah Antitrust Act.

EVIDENCED OBTAINED PURSUANT TO THE SECRET INVESTIGATION SHOULD HAVE BEEN SUPPRESSED

On March 31, 1988, the Utah Supreme Court handed down its decision in In the Matter of a Criminal Investigation, Supreme Court Docket No. 20268 (hereinafter referred to as the Investigation Case). As this Court is aware, that case reviewed the propriety of the investigation which produced the evidence against the Appellant's in the case at bar. The Supreme Court found that the Subpoena Powers Act, Utah Code Ann. §§ 77-22-1 to -3, was not unconstitutional on its face. However, the Supreme Court determined that the Subpoena Powers Act was unconstitutionally applied in the investigation of these Appellants.

Of great significance to this Petition for Rehearing is the fact that the Attorney General conceded that the Subpoena Powers Act was unconstitutionally applied. Investigation Case at 8.

In order for the Subpoena Powers Act to be constitutional, the Supreme Court required that the following procedural guidelines be followed: The investigation may be approved only after the district court has made an objective determination that good cause has been shown. Each individual subpoena may be issued

only after the investigating attorney has made a good faith determination that the testimony or other evidence being sought is reasonably relevant to the authorized investigation. Subpoenaed persons must be afforded an opportunity to challenge the subpoena at some time prior to compliance. The authorizing court has the power to entertain motions to quash and must quash any individual subpoena that does not meet an objective standard of reasonableness. Each witness subpoenaed must be notified (1) of the general subject matter of the investigation, (2) of the existence and nature of the privilege against self-incrimination, (3) that any information provided may be used against the witness in a criminal proceeding, (4) of the right to have counsel present, and (5) whether the witness is a target of the criminal investigation. All investigations must be fully documented and all such documentation must be maintained by the authorizing court. The prosecutor may not have a secrecy order with respect to the entire investigation but must go to the court for an individual secrecy order with regard to each individual interrogation. Investigation Case at 15, 23, 30, 34.

As noted, the Utah Supreme Court determined that the investigation conducted by the State's attorney in this case was unconstitutional. Specifically, the Court found that each subpoena issued represented that it had been authorized by order of the district court and that disobedience to the subpoena was punishable by contempt of court. Since the subpoenas had not

been individually authorized and because contempt of court is a multi-step process, the Supreme Court held that the representations on the subpoenas were misstatements which may have "improperly discouraged the recipients from challenging the subpoenas." Investigation Case at 38. The Court further observed that "to the extent that these misrepresentations discouraged Respondents or other subpoenaed parties from exercising their right to challenge the subpoenas, they denied rights guaranteed by the Act and by the Fourth Amendment." Investigation Case at 39.

The Court also noted that the Attorney General failed to notify the Appellants prior to interrogation "of the general nature and scope of the investigation and of the right to exercise the privilege against self-incrimination. These failures violated Respondent's State and Federal constitutional privileges against self-incrimination." Investigation Case at 39.

Additionally, the Court held that the secrecy provisions of the Subpoena Powers Act were applied too broadly inasmuch as the district court ordered that the good cause affidavit itself was a secret document. The Court observed that "to the extent that the concealment of the good cause statement impeded the challenge of subpoenas or interrogations, it operated to deny rights against unreasonable search and seizure." Investigation Case at 40.

Practically all the evidence presented against the Appellants at trial was obtained as the result of this investigation which the Supreme Court has held to be unconstitutional.

Appellants are aware that this Court has indicated that the evidence was admissible regardless of the Supreme Court's decision in the Investigation Case. Opinion at 6. However, Appellants believe that this Court has overlooked a vital distinction between the good faith exception to the exclusionary rule as it applies in the typical case of a police officer's good faith reliance on a search warrant and the very different scenario presented in the case at bar.

This Court correctly observed that under United States v. Leon, 468 U.S. 897 (1984), evidence need not be excluded where the police officer acts in objectively reasonable reliance on an invalid search warrant. Opinion at 4. Similarly, this Court pointed out that under the analysis of Illinois v. Krull, 107 S. Ct. 1160 (1987), an officer's warrantless search in reasonable reliance on a statute does not require exclusion of evidence even where the statute is later held unconstitutional.

However, the rationale behind Krull is not applicable to the instant case. In Krull, the Court observed that where an officer acts in objectively reasonable reliance on a statute which is held unconstitutional, the exclusion of evidence produces no deterrent effect on officer behavior.

The Court here is not dealing with a police officer but rather with experienced lawyers employed by the Attorney General's Office. While an officer may not be expected to analyze the constitutionality of a statute or the propriety of a

warrant, a prosecutor must be expected to engage in such an analysis. Further, the Court's assumption that the Attorney General's Office acted in good faith objective reliance on the statute impermissibly shifts the burden of showing lack of good faith to the Appellants. Such a shift of burden is one of the reasons Utah Code Ann. § 77-35-12 was stricken down. State v. Mendoza, 748 P.2d 181, 186 (Utah 1987).

Finally, the admission of the Attorney General that the Subpoena Powers Act was unconstitutionally applied flies in the face of the assumption that the Attorney General's conduct was objectively reasonable. The same office which utilized the Subpoena Powers Act has conceded that its application of the Act was constitutionally impermissible. This fact alone demands that the convictions be reversed for failure to suppress the evidence illegally obtained.

CONCLUSION

The issues before this Court are of no small importance and require a reconsideration of the premises for the Court's decision and a review of its consequences. Therefore, Appellants respectfully request that this Court grant the Petition for Rehearing.

The undersigned certifies that this Petition is brought in good faith and not for the purpose of delay.

DATED this _____ day of April, 1988.

Respectfully submitted,

SESSIONS & MOORE

JOHN F. CLARK
Attorney for Appellants-Petitioners

CERTIFICATE OF HAND DELIVERY

I certify that on this 6th day of April, 1988 I caused four copies of Appellants' Petition for Rehearing to be Hand-Delivered to the office of the Utah Attorney General.

John F. Clark
Attorney for Appellants-Petitioners

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