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State of Utah v. A.G. Anderson : Brief of Appellant

Utah Supreme Court

Arthur E. Morton; Attorney for appellant.

In the Supreme Court
of the State of Utah

THE STATE OF UTAH,
Plaintiff,

vs.

A. G. ANDERSON,
Defendant.

No. 4923

APPELLANT'S BRIEF

ARTHUR E. MORETON,
Attorney for Appellant.

In the Supreme Court
of the State of Utah

THE STATE OF UTAH,
Plaintiff.

vs.

A. G. ANDERSON,
Defendant.

No. 4923

APPELLANT'S BRIEF

Counsel who appealed this case for defendant failed to prepare and file any bill of exceptions, and the time for filing such bill of exceptions expired prior to the time the appeal herein was reinstated by this Court at the instance of present counsel. However, we understand one may always attack the sufficiency of the information. Pursuant to Section 9192 Compiled Laws of Utah, 1917, the requests, given or refused, form part of the record on appeal, and any error in the decision of the court therein may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

> "Plain or fundamental errors will be considered where not specially assigned. Thus the court may consider objections that the facts stated in the indictment do not constitute a crime"
>
> 17 C. J. 181.

Fundamental error which will be considered whether assigned or not, is that going to the foundation of the case or taking from the defendant a right essential to his defense. Rea v. State, 3 Okl. CR. 281, 105 Pac. 386.

ASSIGNMENT OF ERROR NO. 1

The information filed against the defendant herein does not state facts sufficient to constitute a public offense for the reason that it is not alleged therein that the alleged possession of intoxicating liquors by the defendant was without a permit or authority of law.

Section 3343 of the Compiled Laws of Utah, 1917, provides,

> "It shall be unlawful for any person within this state to have in his or its procession any intoxicating liquors, except as in this title provided."

The possession of intoxicating liquors is not unlawful under all circumstances, for such possession may be lawful under the circumstances provided in the act. For instance, under Section 3346, the sale of alcohol for certain purposes is authorized, and under Section 3347 the same may be purchased on a permit from the attorney-general. In Section 3349, it is provided,

> "The provisions of this title shall not be construed to prevent any temperate person from manufacturing vinegar or preserved non-intoxicating cider for use or sale; * * * provided, that any person who may engage in the manufac-

> ture of vinegar, preserved non-intoxicating cider, or alcohol *for sale*, as herein provided, shall, before commencing the manufacture thereof, first obtain a permit from the attorney-general."

It is further provided in the same section that the provisions of the act shall not be construed "to prevent the manufacture or sale for lawful purposes of any food preparation, * * * and which substance is manufactured and sold as medicines, flavoring extracts, essences, perfumes, or other similar products for legitimate and lawful purposes and not as beverages." It is manifest from an examination of the act that it was not intended to prohibit the possession of alcoholic preparations under all circumstances.

Because of these exceptions provided in the act itself, it is not only necessary, but has been customary in this state, in charging one with the unlawful possession of alcoholic preparations, to allege that such possession was "without a permit or authority of law." Such an information was, in a liquor prosecution, approved by this court in the case of State v. Hurst, 59 Utah 543, 205 Pac. 335.

It is well established law that if a statute prohibits the doing of a particular act without the authority of a certain thing, the information should negative the existence of that thing before it can be sufficient. Section 8832 of the Compiled Laws of Utah, 1917, requires the information to be direct and certain as regards the party charged, the offense charged, and "the particular cir-

cumstance of the offense, when they are necessary to constitute a complete offense".

In People v. Fairbanks, 7 Utah 3, the Court held that under Section 4488 Compiled Laws of Utah, 1888 providing that "every person who, with intent to do bodily harm and without just cause or excuse, etc., commits an assult," etc., the indictment must negative the excepting clause "without cause or excuse".

The Court said at the bottom of page 5 of the opinion,

> "We think the statute creates an offense limited to a particular class of conditions; that it was not intended by it to impose the penalties therein provided generally upon all persons who should make an assault upon another with a deadly weapon with intent to do bodily harm, but only upon those who should do so under certain conditions; * * * we think that to negative the existence of 'just cause or excuse' is just as essential as it is to aver the intent to do bodily harm with a deadly weapon."

We think that it is just as essential in a prosecution for possession of alcoholic beverages to negative the existence of "without a permit or authority of law" as it is to aver the possession of the forbidden substance.

Under the title "Intoxicating Liquors" in 33 C. J. 726, is the following statement of the law,

> "The indictment must contain an allegation denying the existence of a license or authority in defendant to make the sale or to do the other act complained of, when that fact is a necessary ingre-

dient of the offense charged, or where having a license or authority would have rendered the sale or other act lawful."

Such appears to be the law in those states having laws regulating the sale and traffic in liquor. It appears from the note on the same page of the authority last quoted, that the states of Delaware, Montana and Oregon have recognized the necessity of such an allegation negativing the existence of a permit or authority of law, by the enactment of specific statutes in those states to the effect that informations need not contain such negative averment.

"Subject to statutory provisions, the general rule as to negativing exceptions apply as to indictments for violations of the liquor laws."

33 C. J. 727.

"A conviction cannot be sustained where all the facts stated in the indictment might be true and still accused might not be guilty of the offense intended to be charged."

31 C. J. 693.

"The indictment must show on its face that if the facts alleged are true, and assuming that there is no defense, an offense has been committed. It must therefore state explicitly and directly every fact and circumstance necessary to constitute the offense, whether such fact or circumstance is an external event, or an intention or other state of mind, or a circumstance of aggravation affecting the legal character of the offense. Unless the indictment complies with this rule, it does not state the offense. The charge must always be sufficient to support itself. It must directly and distinctly

> aver every fact or circumstance that is essential, and it cannot be helped out by the evidence at the trial or be aided by argument and inference. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many; and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment or the indictment will be bad."

Clark Criminal Procedure 153.

> "It is necessary to negative an exception contained in a statute defining an offense where it forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted."

31 C. J. 720.

A count of an indictment for selling cocaine is defective where it does not aver that the sale was without the prescription of a physician. State v. Weir, 71 W. Va. 93, 76 S. E. 138.

An indictment charging a violation of the Sunday laws, not negativing the exceptions contained in the paragraph denouncing the offense, is bad. Com. v. Hagan, 176 Ky. 619, 181 S. W. 184.

An indictment for conducting a pharmacy, under a section excepting subsequent provisions, must negative such a provision in a subsequent section alleging that defendant did not employ a registered pharmacist. State v. Hamlett, 129 Mo. A. 70, 107 S. W. 1012.

In State v. Renkard, 150 Mo. A. 570, 574, 171 S. W. 168, the Court said,

> "Unless the indictment negatives every hypothesis under which it (cocaine) may be sold without impinging the statute, the presumption of innocence obtains in the defendant's favor, for nothing may be taken by intendment."

The defect in the information cannot be cured by evidence or verdict. This Court in the case of State v. Topham, 41 Utah 39, 123 Pac. 888, said, at page 54,

> "Firstly, an information wanting in essentials cannot be helped or aided by evidence, and its sufficiency in such regard cannot be determined by what the state proved or failed to prove. If anything is established and set at rest in the law, it is that defects in substance of an information or indictment cannot be cured by evidence or verdict."

At page 62 of the same opinion, this Court said,

> "Even though the evidence should support a good information, yet, for the reasons already stated, the prosecution must fail because of the fatally defective information; such a defect being incurable by evidence or verdict. An information or indictment when assailed as to substance must stand or fall by its own structure."

The information in the instant case is manifestly bad and fatally defective and will not support the judgment.

The information herein does not state facts sufficient to constitute a public offense for the reason that it is

not alleged therein that the prior conviction of the defendant was for a violation of Title 54 Compiled Laws of Utah, commonly known as the Prohibition Act, and for aught there appears therein, such prior conviction may have been for a violation of some city or town ordinance.

State v. Hurst, 59 Utah 543.

The information herein does not state facts sufficient to constitute a public offense for the reason that the defendant is not charged therein with violating any specific law of the state of Utah, but merely with "being a persistent violator of *the act* prohibiting the manufacturing and use of intoxicating liquors", without further definition or description of the act referred to.

Aside from the failure of the information to negative the exceptions contained in the statute, we think it is defective with reference to the allegations therein as to a prior conviction and as to the circumstances which increase the offense from a misdemeanor to a felony.

> "It is necessary that the allegation bring accused clearly within the intent of the statute prescribing the additional punishment. In this respect the charge must be definite and certain * * * . A prior conviction should be alleged directly and not by recital."
>
> 31 C. J. 735.

In the information herein the references made to the prior conviction are by recital and there is no direct allegation with respect thereto, and hence the information is defective.

> "To subject a person indicted for a second offense to a superimposed penalty because of a former conviction, when authorized by statute, the indictment must directly aver such a conviction with particularity and definiteness at least to an extent sufficient to advise the accused of the charges he must be prepared to meet, and to enable the Court to determine whether or not the statute applies."
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> State v. Savage, 86 W. Va. 655, 104 S. E. 153, 154.

We submit that this Court, from the allegations contained in the information, cannot determine whether the statute, with reference to persistent violators, applies to this case. Therefore, under the rule that nothing can be left to intendment in informations for felonies, the information is fatally defective in this respect. While the complaint states in what court the prior conviction was had, it fails to state what law the defendant violated, and leaves wholly to conjecture whether the law so violated was a town or city ordinance, or a state law.

ASSIGNMENT OF ERROR NO. 2.

The court erred in its instructions to the jury in failing to define and make a distinction between intoxicating liquor and preparations or products not intended for beverage purposes, of which one may have the lawful possession, and such failure to so instruct was, and is, such manifest and prejudicial error that even in the absence of a bill of exceptions this court should take notice thereof, and particularly so since the defense was that the

preparations in the possession of the defendant were not made for, nor intended as a beverage. (Ab. 3, 4 and 9)

The theory of the defense is contained in the defendant's requested instructions Nos. 1 and 2, pages 3 and 4 of the abstract. We think it was manifest and prejudicial error for the court to refuse to give these two instructions. Particularly in view of the fact that the information does not state that the alleged possession of the defendant was "without a permit or authority of law."

WHEREFORE, appellant prays that the judgment herein be set aside and the case dismissed.

ARTHUR E. MORETON,
Attorney for Appellant.