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

Utah Supreme Court

George P. Parker, L.A. Miner; attorneys for the respondent.

In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

A. G. ANDERSON,
Defendant and Appellant

No. 4923

RESPONDENT'S BRIEF

This is a case in which the defendant was convicted of the crime of being a Persistent Violator of the act "Prohibiting the Manufacture and Use of Intoxicating Liquors and Regulating the Sale and Traffic therein".

A conviction was had in the district court in and for Washington County, State of Utah. The information in said case, omitting the title and cause, reads as follows:

> "A. G. Anderson the defendant above named having heretofore, to-wit, on the 6th day of March, 1929, been duly committed to this court by W. G. McMullin, a committing magistrate of Washington County, State of Utah, to answer to the charge hereinafter specifically set forth is accused by A. L. Larsen, District Attorney of the Fifth Judicial District, State of Utah, County of Washing- to-wit, the crime of being a persistent violator

ton, by this information of the crime of felony, of the act prohibiting the manufacture and use of intoxicating liquors and regulating the sale and traffic therein, as follows, to-wit:

> That the said defendant A. G. Anderson, on the 24th day of February, 1929, at the county of Washington, State of Utah, then and there being did wilfully, unlawfully and feloniously have in his possession intoxicating liquor containing more than one half of one per cent alcohol by volume, the said A. G. Anderson being then and there a persistent violator of the act prohibiting the manufacture and use intoxicating liquors and regulating the sale and traffic therein, he having theretofore, to-wit: on the 20th day of June, 1928, in the Justice's Court of the Leeds Precinct, Washington County, State of Utah, been convicted of having the unlawful possession of intoxicating liquors, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Utah."

There is no bill of exceptions in this case. The record consists of the Judgment Roll only. No demurrer was interposed to the Information. Two assignments of error are argued in the brief filed on behalf of the appellant.

First assignment of error is—"The information filed against the defendant herein does not state facts sufficient to constitute a public offense." The particular part of the act with which the defendant is charged with having violated, consists of that part of section 3343 of the Compiled Laws of Utah 1917, to-wit: "It shall be unlawful for any person within this State

knowingly to have in his or its possession any intoxicating liquor, except as in this title provided."

It is contended by the appellant that the information does not state facts sufficient to constitute a public offense, because it is not alleged therein that the alleged possession of intoxicating liquor by the defendant "was without a permit or authority of law". We are at a loss to know just what counsel for appellant has in mind by this objection, for no where in the act referred to in the information is authority expressly given for any person to have in his possession intoxicating liquors, either with or without a permit or authority of law. It may be because the statute, section 3343, which makes it unlawful for any person within this State knowingly to have in his or its possession, any intoxicating liquor, contains this further language, "except as in this title provided". In other words, counsel seems to take the position that because the statute referred to contains the words "except as in this title provided" it became necessary for the pleader to negative any or all situations where it might be lawful to have intoxicating liquor in one's possession and that such excepting words should be negatived.

This court has held in the case of State vs. Swan, 31 Utah, 340—"the law or statute is, in contemplation of law, always a part of any information to the same extent as if the same were referred to or set forth therein." This being so no person of ordinary intelligence could fail to understand what offense was intended to be

charged. The charge therefore met with the degree of certainty required by the statute.

Counsel refers to the case of State vs. Hurst, 59 Utah 543; 205 Pac. 335, where the information charged the defendant therein with the unlawful possession of intoxicating liquor. The information contained the further language "without permit or authority of law" and because the use of such words was not condemned he concludes that the information in the instant case was defective because it did not contain such words. Counsel says

> "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 should be sufficient."

We may concede this but what has it to do with the information in the instant case? The statute in question in this case is not one prohibiting the having in possession of intoxicating liquors without a permit or authority of law. The words "without a permit or authority of law" forms no part of the statute. The rule as to exceptions in a statute is stated as follows:

> "The general rule as to negativing an exception in charging a statutory offense, is that where the subject of any exception is found in the negativing or prohibitory clause, it must be included by an averment in the pleading, but if found in a separate substantive clause, or in a subsequent statute and is not an essential part of the description of the offense, it is a matter of defense and

need not be negatived." Joyce on Intoxicating Liquors, sec. 663.

See also

State vs. Van Villet, 92 Iowa 476; 61 N. W. 241, where it is said:

> "It is a rule in both civil and criminal pleadings that where an action is predicated upon a statute to which there is an exception or proviso, it is sufficient for the pleader to state only so much as will make out a prima facia case, and if the proviso or exception be found in a separate section or in a subsequent substantive enactment, it is defense and should be left to the other party; but if it be matter of exception contained in the negativing or prohibiting clause, it is a part of the thing prohibited and the recording must show that this matter of exception does not cover the act complained of."

Pleader must negative exception found in enacting clause of statute but not exception contained in some other part of the statute, or in other statute or constitution. People vs. Lewis, 198 N. W. 957; 27 Mich. 343.

While exceptions in enacting clause must be negatived an exception in subsequent clause or subsequent statute is a matter of defense to be shown by defendant. People vs. Willi 179 N. Y. Sup. 542.

An indictment charging a statutory offense need not negative an exception or proviso in the statute which is separable from the description of the offense and not an ingredient thereof. Moore vs. State 236 S. W. 477.

In declaring on a statute where there is an exception

in the enacting clause the pleader must negative the exception, but where there is no exception in the enacting clause, an exception in the proviso thereto or in a subsequent section of the act, or where it is adopted into the enacting clause merely by reference, is a matter of defense and must be shown by the defendant. People vs. Grabiec 178 N. W. 55; 210 Mich. 559.

Indictments under the liquor laws are also subject to this general rule:

Carson vs. State, 69 Ala. 235;
Tigner vs. State, 119 Ga. 114; 45 S. E. 1001.
Mitzkir vs. People, 14 Ill. 101.
State vs. Abbott, 31 New H. 434.

The fact must not be lost sight of, that Title 54, Compiled Laws of Utah 1917 does not authorize specifically any person to have in his possession, intoxicating liquor. Only such persons who are authorized to sell it or to buy it or to distribute it or to receive it or to import it are authorized to have it in their possession, and so when the statute makes it unlawful to have intoxicating liquor in one's possession "except as in this title provided", it contemplated that the persons who are authorized to buy intoxicating liquors might have it in their possession only for the purpose of selling it to someone authorized to buy it, and that such persons as were authorized to buy it could have it in their possession only in order to make use of it in the manner authorized by the act. The exception contained in the statute, making it unlawful to have intoxicating liquor in one's

possession, was to make it possible for certain authorized persons to traffic in intoxicating liquors for certain designated purposes without violating the statute relating to possession of intoxicating liquor.

We direct the court's attention to the case of State vs. Rickenburg, 198 Pac. 767, a Utah case. The information in that case was like the one in the instant case, with this exception, namely, that instead of referring to the defendant as being a persistent violator of the act prohibiting the manufacture and use of intoxicating liquors and regulating the sale and traffic therein, it referred to the defendant as "persistent violator of title 54, section 3343 Compiled Laws of Utah 1917."

This court held the information in the Rickenburg case to be sufficient. The defendant in the instant case was certainly not misled by virtue of the description of the act with which he was charged with having violated. He knew what it was all about. But even if he did not know as a matter of fact what law he was charged with violating, the fact that the title of the act was set out in full in the information, afforded him a better opportunity of learning just where it could be found in the code than merely designating the title of the act by number. Title 54 is not to be found in the index at all, whereas the act is referred to in the index under the heading of "Prohibition" and also under the heading of "Intoxicating Liquor" and the page is given in each instance where the act is to be found.

It is further contended by appellant in support of

this assignment of error that this court, from the allegation contained in the information, cannot determine whether the statute with reference to persistent violators applies in this case, and therefore that under the rule nothing can be left to intendment in informations for felonies, the information is fatally defective. He says that 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.

With respect to this particular contention, we submit that it follows the language used in the information contained in the Rickenburg case exactly, with respect to the allegation of conviction of the prior offense on the part of the defendant and shows that a conviction was had in a precinct court and not in the court of any city or municipality. The only thing he could be convicted of in the precinct court was for a violation of a state law.

The second assignment of error relied upon by the defendant is that "the court erred in its instructions to the jury in failing to define and make a distinction between intoxicating liquors and preparations or products not intended for beverage purposes, of which one may have lawful possession, and said failure to instruct was and is such manifest 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. The defendant was charged with unlawful possession of intoxicating liquors. If the evidence showed that he had possession of such intoxicating liquors, the fact that he did not intend to use such liquors as a beverage, would not and could not constitute a defense to the charge. We have already pointed out that there is no bill of exceptions in this case. None of the evidence that was introduced at the trial court is before this court. How then is it possible for this court to say what the theory of the defense was. It cannot be assumed that it was to be found in the defendant's request for instructions, because it cannot be determined that the requested instructions were justified by the evidence, there being no evidence from which the reasonableness of such request can be determined.

This court in the case of People vs. Lyman, 2 Utah 30, held that instruction should always be given with reference to evidence in the case. On one state of facts as disclosed by the testimony, the instruction may be strictly proper and right, while on another and different state of facts it might be improper, as calculated to mislead the jury, and this court will not presume error unless the facts from which such presumption can be fairly adduced, are disclosed by the record.

The information in this case is before the court, in view of the fact that it constitutes a part of the Judgment Roll. The instructions given by the trial court

also constitute a part of the Judgment Roll, and we submit that instruction No. 1 correctly states the law with respect to what the evidence would have to be in order for the jury to convict the defendant, and in any event the requested instruction referred to in appellant's assignment of error No. 2 could not properly have been given, because of the fact that even if the defendant had possession of intoxicating liquors which he did not intend to use as a beverage, that would not have constituted a defense to the charge contained in the information.

In conclusion we respectfully submit that the authorities cited by the appellant in his brief in support of his first assignment of error, sustain our view as to what the correct rule is with respect to exceptions or provisos contained in a statute like the one in question.

Respectfully submitted,

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