2001

State of Utah v. One Porsche 2 door : Petition for Rehearing

Utah Supreme Court

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OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Appellant,

vs.

ONE (1) PORSCHE 2 DOOR, I.D. NO. 911211026, TITLE NO. PP10026F, BEARING KANSAS LICENSE PLATE NO. JOR 1652,
Defendant-Respondent.

Case No. 13495

PETITION FOR REHEARING AND BRIEF

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PETITION FOR REHEARING AND BRIEF

The Plaintiff-Appellant petitions this Honorable Court for rehearing in the above entitled case pursuant to Utah Rules of Civil Procedure, Rule 76(e), for the reasons that (1) the Court has misapprehended the facts and the law upon which it based its decision and (2) the Court's opinion creates uncertainty in the law as to whether Utah Code Ann. § 58-37-13(1)(e) (1953), is invalid or merely inapplicable to the facts of this case.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING

POINT I.

PETITION FOR REHEARING IS PROPERLY BEFORE THE COURT UNDER THE FACTS OF THIS CASE.

This Court has previously recognized that to make an application for a rehearing is a matter of right. *Cummings* v. *Nielson*, 42 Utah 157, 129 P. 619 (1913). Nevertheless, plaintiff-appellant recognizes that this right is not absolute and that a petition for rehearing should not be utilized to challenge areas of the Court's decision which appellant merely disagrees with or considers unsatisfactory. Nor should the rehearing be used to reargue grounds originally presented. *Cummings* v. *Nielson, supra; Beaver County* v. *Home Indemnity Co.*, 88 Utah 1, 52 P. 2d 435 (1935). The standard established by this Court in determining whether a petition for rehearing is proper was expressed long ago in *Brown* v. *Pichard*, 4 Utah 292, 11 P. 512, reh. den., 4 Utah 292, 9 P. 573 (1886):

> "To justify a court in granting a rehearing it must be convinced that there has been a failure to consider some material point in the case; that there has been error in the conclusions heretofore arrived at; or that some matter has been discovered unknown at the time of the hearing."

See also *Cummings* v. *Nielson, supra*, at 624, wherein the Court stated the following:

> "When this court . . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have *misconstrued* or overlooked *some material fact or facts*, or have overlooked some statute or decision which may affect the result, or that we have *based the decision on some wrong principle of law*, or have either misapplied or overlooked something which materially affects the result . . . If there are some reasons . . . such as we have indicated above, *or other good reasons*, a petition for a rehearing should be promptly filed, and, if it is meritorious, its form will in no case be scrutinized by this court." (Emphasis added.)

The remaining points of this brief will adequately show that this petition for rehearing is properly before this court on the grounds that this court misconstrued or misapprehended certain material facts of this case in reaching its decision, certain law was likewise misconstrued, and finally there are adequate "other good reasons" for rehearing the case — namely, the Court's opinion has left uncertain whether Utah Code Ann. § 58-37-13(1)(e) (1953), is invalid or merely inapplicable to the narrow facts of this case.

POINT II.

THE OPINION OF THE COURT RAISES AND LEAVES UNANSWERED THE IMPORTANT QUESTION CONCERNING THE PRESENT VALIDITY OF UTAH CODE ANN. § 58-37-13(1)(e).

There are three separate sections of the Court's opinion which specifically discuss the *possibility* that the statute may be invalid, yet, the Court never resolves this critical issue.

The third paragraph of the opinion begins as follows:

> "The section of the statute under which this forfeiture was accomplished, Title 58-37-13(1)-(e), Utah Code Annotated 1953, *either is invalid or inapplicable under the facts of this case* for the following reasons . . ." (Emphasis added.)

The first paragraph under Point III of the Court's opinion reads in part as follows:

> "The statute obviously can lead to the most absurd results, — a reason this Court consistently has pointed up as a valid reason for *invalidation of a statute, or a refusal to apply it under particular facts* making such application ridiculous . . ." (Emphasis added.)

The second paragraph under Point IV reads in part as follows:

> "The most that can be said for this statute's efficacy or practical worth, *much less its validity*, was said in 1967, when the California legislature repealed its legislation on forfeiture of vehicles used in violation of narcotics laws . . ." (Emphasis added.)

All three paragraphs raise the question of the Utah statute's validity but the Court never reaches a conclusion

in the matter. Unless this issue is resolved, law enforcement officers and prosecutors throughout Utah will be reluctant to invoke the forfeiture statute even in cases involving the most flagrant narcotics law violator.

Appellant submits that the Court, by questioning the validity of Utah's forfeiture statute, apparently overlooked or misapprehended the case of *Astol Calero-Toledo, et al.* v. *Pearson Yacht Leasing Co.*, ... U. S. ....., 94 S. Ct. 2080 (1974), wherein the United States Supreme Court recently declared the principle of forfeiture constitutional. In that case, Puerto Rico's forfeiture statute (which is virtually identical to Utah's) was in question. See Puerto Rico Laws Ann. Tit. 24, Section 2512 (a) (4). The summary of the *Pearson Yacht Leasing Co.* case contained in Utah's dissenting opinion in the instant case is a correct evaluation and reads as follows:

> "That principle (forfeiture as a method of law enforcement) was reaffirmed in a situation greatly more exaggerated than the instant one. After officers had discovered marijuana aboard, the Yacht was seized and forfeited pursuant to Puerto Rican statutes. The Supreme Court rejected the attack upon the procedure and the statutes; and particularly rejected the contention of deprivation of property without due process of law under the Fourteenth Amendment. It is noteworthy that our Utah statute is more fair than the one under attack in the Calero-Toledo case, in that under our statute the owner is given the opportunity to show his innocence and his interest will be protected."

In view of the United States Supreme Court decision on this precise point, Utah's statute is valid on its face and should be enforced and the present uncertainty in the law created by the Court's opinion should be remedied.

POINT III.

THE COURT'S CONCLUSION THAT UTAH CODE ANN. § 58-37-13(1)(e) (1953), AS APPLIED TO THIS CASE LEADS TO AN UNUSUALLY HARSH RESULT AND CONSTITUTES AN ADDITIONAL FINE OR PENALTY IS BASED UPON A MISCONSTRUCTION OF BOTH FACT AND LAW.

Paragraph 1 of Point I of the Court's opinion reads in pertinent part as follows:

> "I. The section [Utah Code Ann. § 58-37-13(1)(e) (1953)], as applied to this case leads to an unusually harsh result, constitutes an additional fine or penalty in connection with a misdemeanor — that of possession of marijuana."

In support of this conclusion, the Court then states that it is "*conceded*" that the basis of the charge was that Mr. Price was in possession of "one ounce of marijuana." Appellant never made such a concession, and the transcript in fact makes clear that Mr. Price was not only in possession of more than one ounce of marijuana,

but was also in possession of numerous pills which he admitted were amphetamines:

> TRANSCRIPT (Officer Pectol), Page 7: "I laid all the stuff containing contents of the sack on the hood of the patrol car and asked him (Price) if he could identify it and asked him if the other two passengers knew what was in the vehicle. And he stated no, that the marijuana was his, and I asked him if he could identify the pills and he said they are amphetamines."

Testimony on pages 14-15 of the transcript shows that Officer Pectol had located a paper sack in the glove box of Mr. Price's automobile, and that the sack contained two plastic bags of a substance which Mr. Price admitted was marijuana and further contained a pill box "containing several different colored pills" (admitted by Price to be amphetamines). Reference is also made to "a little leather type pouch with some more marijuana and also a little pill capsule containing red pills" (T. 15).

The Court's notion that the automobile contained only one ounce of marijuana is probably due to the fact that the report of Mr. Bradley from the state toxicologist says that he received thirty grams (approximately one ounce) of plant material, canabis sativa (T. 12). However, Officer Pectol explains that he merely sent a "sample" of the total amount of drugs found in the automobile to the state laboratory:

> TRANSCRIPT, p. 15 (Officer Pectol): "A. we dumped all of the contents on the desk in

> the patrol office. *Took a sample of marijuana* and placed it in a plastic bag and taped it up, placed it inside of the yellow envelope. Wrote on *the sample* 1, my case number and what *the sample* was containing. Sealed that envelope, taped it and initialed it, and we did this to each of the different colored pills.
>
> Q. That was sent in to the state toxicologist?
>
> A. Yes."

From the above evidence, it is clear that the automobile contained far more illicit drugs than merely one ounce of marijuana and that the one ounce figure reprsented a small "sample" of the total amount involved. Thus, the Court's decision that the forfeiture statute as applied to this case leads to an unusually harsh result is predicated upon a misconstruction of the actual facts of this case and for this reason alone should be reconsidered.

Secondly, the Court concluded in Points I and II of the opinion that the forfeiture statute is *exclusively* aimed at deterring transportation of illicit drugs for distribution. The second paragraph under Point II reads as follows:

> "It appears *obvious* that the *primary and sole purpose* of the statute and the intent of the legislature were directed *exclusively* toward the *transportation* of a controlled substance *for distribution* according to erstwhile law merchant principles, and *not for personal possession and consumption.*" (Emphasis added.)

Appellant submits that the legislature never intended the forfeiture statute to apply *exclusively* to "transportation for distribution" type cases alone. The wording of the statute shows that the legislature *also* recognized the evils of mere possession or concealment of illicit drugs, and that vehicles could be used for these purposes as well. The language of the statute reads as follows:

> "(1) The following shall be subject to forfeiture and no property right shall exist in them:
>
> * * *
>
> (e) All conveyances including aircraft, vehicles or vessels used or intended for use, to transport, or in any manner facilitate the transportation, sale, receipt, possession, *or* concealment of property described in (1)(a) or (1)-(b) of this section . . ." (Emphasis added.)

Had the legislature intended to exclude possession or concealment from the forfeiture provision the statute would have ended after the word "receipt." The use of the word "or" just prior to the word "concealment" and the placement of the commas in the statute are also significant in that these grammatical tools further show the legislature's intent to include under the act vehicles used or intended for use *either* to transport *or* possess or conceal illicit drugs. One illegal activity (transportation of drugs) clearly was not intended to work to the exclusion of other violations of the act.

Appellant does not dispute that the transporting of illegal drugs is a far more serious offense than possession.

The entire Controlled Substances Act supports this concept. However, unlawful possession of a controlled substance is also a violation of the act, and the legislature clearly intended to include this class of offense under the forfeiture statute.

Thus, it is submitted that the Court misconstrued the forfeiture statute and the intent of the legislature in reaching those conclusions expressed in Points I and II of the Court's opinion.

Finally, the Court concluded that the forfeiture in the instant case "constitutes an additional fine or penalty in connection with a misdemeanor — that of possession of marijuana." Appellant submits that while the forfeiting of an automobile certainly does constitute an additional financial hardship on the accused over and above the punishment imposed for being convicted of violating the Controlled Substances Act, the legislature fully intended to authorize such forfeitures (even where the value of the automobile exceeds the punishment for the offense). Utah Code Ann. § 58-37-8(8) (1953), provides as follows:

> "Any penalty imposed for violation of this section shall be in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law."

Furthermore, the United States Supreme Court was faced with a "possession" situation in the *Pearson Yacht Leasing Co.* case, *supra*, where an expensive yacht was seized, yet the forfeiture was upheld.

Thus, the value of the conveyance or vehicle is irrelevant under Utah's forfeiture statute and should not have been considered by the Court in its decision.

POINT IV.
THE COURT HAS ASSUMED A LEGISLATIVE FUNCTION BY MODIFYING A STATUTE OTHERWISE CLEAR ON ITS FACE.

The court's role is certainly to interpret the law. However, it may not rewrite or disregard statutes that are clear on their face. In *Howard* v. *Howard*, 333 P. 2d 417 (Cal. App. 1958), the court expressed the above accepted statement of the law and stated:

> "Any changes (in the statute) must come from the legislature. The court may interpret but not rewrite statutes."

When the statute, as in the present case, is clear on its face the court errs by speculating that the legislature meant something other than what it said. In *Woodmansee* v. *Lowery*, 334 P. 2d 991 (Cal. App. 1959), the court cites approvingly 45 Cal. Jur. 2d p. 621 § 108 when it states:

> ". . . it is equally true that where the meaning of a statute is clear courts "*must follow* the language used and *give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act,* even if it appears probable that a different object was in the mind of the legislature." (Emphasis added.)

In the case of the statute in question, it is clear that an automobile used to transfer or facilitate the transportation *or possession* of a controlled substance is subject to forfeiture. It is true, as the majority opinion points out, that a thrust of the statute is to control transportation of illicit drugs from one place to another. However, an equally important thrust, as indicated by the clear language of the statute, is to *deter possession* of illicit drugs. The wisdom of the statute may be questionable as well as the deterrent effect on the trafficking and possession of illicit drugs. However, the language is clear and must be enforced by the courts. Other questions as to the statute's propriety and wisdom should be deferred to the legislature.

POINT V.

THE OPINION OF THE COURT DOES NOT ESTABLISH ANY WORKABLE STANDARDS OR GUIDELINES FOR FURTHER APPLICATION AND ENFORCEMENT OF THE FORFEITURE STATUTE.

In light of this decision by the Court, the state officials responsible for applying and enforcing the laws of the State of Utah are presently in a quandry as to how to apply the Utah forfeiture statute. The legislature had drawn the line of enforcement of the statute to include use of any conveyance for the possession of illicit drugs. The Court now seems to say in a strict reading of its holding that one in possession of only one ounce of a

controlled substance whose car is valued at $10,000 cannot have his car forfeited. The Court indicates that under those circumstances such a forfeiture is unconscionable. But what if the possessor of the controlled substance has 2 ounces and his vehicle is worth only $9,000.00? At what point will the court be satisfied that the forfeiture of such property is not an unconscionable penalty?

Appellant submits that the amount of the controlled substance and the value of the automobile are both irrelevant factors under the present Utah forfieture statute. No specified quantity of narcotics need be involved to result in forfeiture. *People* v. *One* 1941 *Buick Club Coupe*, 165 P. 2d 44 (Cal. App. 1946), *People* v. *One* 1940 *Buick Sedan*, 162 P. 2d 318 (Cal. App. 1945).

Nor does the statute require a purpose test before a conveyance is to be forfeited. Tourism as a sole purpose for being in the state has no relevance to the misdemeanor of possession of an illicit drug.

The decision as it now stands leaves both law enforcement as well as future offender guessing in regard to this statute. A clarification of this point is direly needed especially by the state officials entrusted with the enforcement and application of the narcotics laws.

POINT VI.

THE EXCEPTIONS TO THE STATUTE DO NOT DEVOUR IT BUT PROVIDE A PRO-

TECTION FOR INNOCENT PARTIES WHO HAVE INTERESTS IN THE FORFEITED PROPERTY.

The purpose of the statute is to act as a deterrent to possession of illicit drugs. There is little use in deterring innocent parties from doing something they are not doing. Therefore, in order to deal fairly with those who hold security interests who did not know of the illegal activity they were involved in, exceptions to the statute were included. The statute requires that the party who has the interest in the conveyance show that "he could not have known in the exercise of reasonable diligence that the violation would take place in the use of the conveyance." The language of the statute would seem to indicate that the burden to show that one did not know of the illegal activity is upon the interest holder.

The exceptions to the statute do not give the offender the right to drive freely through the state simply because he is not the owner, free and clear, of the vehicle. It means that an innocent party's interest in the forfeited vehicle will be protected. Upon a showing "that in the exercise of reasonable diligence" the holder of the security interest could not have known that a violation would take place, the interest will be recognized. In such a case the court should enter a judgment of forfeiture subject to the rights of the secured party. Upon presentation of his claim the party can then be satisfied out of the proceeds of the sale of the vehicle. When the amount due the conditional seller of an automobile is

in excess of the value of the vehicle at the time of and after its seizure, the court should order the vehicle released to the lienholder instead of ordering a forfeiture of the vehicle subject to the legal owner's rights. *People* v. *One* 1957 *Ford 2-Door Sedan*, 325 P. 2d 676 (Cal. App. 1958).

The above procedure insures that the deterrent effect of the statute is maintained in that the offender is no longer in possession of the vehicle and has lost whatever interest he may have had in it while the innocent security interest holder who comes forth with a showing of his innocence is protected.

CONCLUSION

Because the Court, in reaching its decision, misapprehended certain facts and law surrounding the case, and also because the opinion creates uncertainty in the law as to whether Utah Code Ann. § 58-37-13(1)(e) (1953) is invalid or merely inapplicable to the facts of the case, it is urged that the case should be reheard, reconsidered and the decision of September 18, 1974, be vacated.

Respectfully submitted,

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