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Pamela Peck v. William Dunn, Et Al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAMELA PECK,)
Plaintiff-Appellant,)

-v-)

Case No. 15338

WILLIAM DUNN, PETE KUTULAS,)
and WILLIAM HUTCHINSON, as)
members of the Board of)
County Commissioners of)
Salt Lake County,)

Defendants-Respondents.)

BRIEF OF RESPONDENTS

An Appeal From the Judgment Entered in the
Third Judicial District Court, In and For
Salt Lake County, The Honorable Jay E. Banks,
Presiding

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

PAMELA PECK,)

Plaintiff-Appellant,)

vs.)

Case No. 15338

WILLIAM DUNN, PETE KUTULAS,)

and WILLIAM HUTCHINSON, as)
Members of the Board of County)

Commissioners of Salt Lake)

County,)

Defendants-Respondents.)

BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

Plaintiff-appellant initiated this action in the lower court to obtain declarative and injunctive relief from the enforcement of Title 16, Chapter 3, Section 28 of the Revised Ordinances of Salt Lake County.

DISPOSITION IN THE LOWER COURT

On the 29th day of June, 1977, the Honorable Jay E. Banks, Judge of the Third District Court of Salt Lake County, State of Utah, denied appellant's Motion for Summary Judgment, and granted respondents' Motion to Dismiss on the ground that Title 16, Chapter 3, Section 28 of the Revised Ordinances of Salt Lake County is constitutional and a valid exercise of the powers of the Board of County Commissioners of Salt Lake County.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the lower court's decision which held Title 16, Chapter 3, Section 28 of the Revised Ordinances of Salt Lake County, 1966, as amended, valid, constitutional, and enforceable.

STATEMENT OF FACTS

Effective May 20, 1976, Salt Lake County enacted Title 16, Chapter 3, Section 28 (h) of the Revised Ordinances of Salt Lake County making it a nuisance to keep animals for fighting. The ordinance reads:

"(h) Nuisance to keep animals for fighting. Any person, firm or corporation who shall raise, keep or use any animal, fowl or bird for the purpose of fighting or baiting; and any person who shall be a party to or be present as a spectator at any such fighting or baiting of any animal or fowl; and any person, firm or corporation who shall rent any building, shed, room, yard, ground or premises for any such purposes as aforesaid; or shall knowingly suffer or permit the use of his buildings, sheds, rooms, yards, grounds or premises for the purposes aforesaid; and any person, firm or corporation who shall knowingly carry, haul or deliver any animal, fowl or bird to be used for any of the purposes aforesaid, shall be guilty of a Class "B" misdemeanor, and shall be subject to a fine in an amount not to exceed \$299.00 or imprisonment in the county jail not to exceed six months, or both. "

On January 8, 1977, appellant was present at a cockfight, and was arrested for violating the above ordinance provisions. Appellant subsequently filed a declaratory judgment action on March 21, 1977 seeking a declaration that the above ordinance was unconstitutional.

On April 13, 1977, respondents moved to dismiss appellant's complaint, and appellant moved for summary judgment. Respondents' motion to dismiss was granted on June 29, 1977 on the ground that said ordinance was constitutional and a valid exercise of their legislative power.

lative powers. Appellant's motion for summary judgment was denied in the same order.

Appellant then appealed the lower court's decision.

POINT I

COCKFIGHTING IS A FORM OF GAMBLING INVOLVING
CRUELTY TO ANIMALS, WHICH CAN BE PROHIBITED
BY ORDINANCE

Pursuant to Sec. 17-5-35, U.C.A., 1953, as amended, and Article VI §28 of the Constitution of Utah, Salt Lake County is empowered to enact ordinances to prevent gambling involving cruelty to animals. In enacting Section 16-3-28(h) of the Revised Ordinances of Salt Lake County, 1966, as amended, Salt Lake County passed a police ordinance conforming to Section 76-10-1101(1), U.C.A., 1953, as amended, prohibiting gambling; and Sec. 76-9-301(1), U.C.A., 1953, as amended, prohibiting cruelty to animals. Section 76-10-1101(1), U.C.A., 1953, as amended, defines gambling as:

"..(the) outcome of a contest, game, gaming scheme, or gambling scheme, or gaming device when the return or outcome is based on an element of chance . . ."

Cockfighting has long been considered as a game of chance; see Kilpatrick vs. State, 58 N.M. 88, 265 P.2d 978 (1953); National Conference on Legalizing Lotteries vs. Farley, 68 App. D.C. 319, 96 F. 2d 861 (1938) (writ of cert. den. in 305 U.S. 624, 83 L.Ed. 399, 69 S.Ct. 85); and in Bagley vs. State, 1 Humph (Tenn.) 486 (1840), where it was observed that there is scarcely any event more dependent upon hazard and address than the result of a cockfight.

Cockfighting in Utah is also considered as cruelty to animals under Sec. 76-9-301, U.C.A., 1953, as amended:

"A person commits cruelty to animals if he intentionally or knowingly:

...

(f) causes one animal to fight with another."

Salt Lake County was therefore acting within its police powers in enacting Sec. 16-3-28 of the Revised Ordinances of Salt Lake County, 1966, as amended, banning cockfighting within Salt Lake County limits.

POINT II

THE ORDINANCE PROHIBITING SPECTATORS FROM ATTENDING COCKFIGHTS IS NOT VIOLATIVE OF DUE PROCESS AS BEING VAGUE, INDEFINITE, OR OVERLY BROAD

Under Section 76-2-202, U.C.A., 1953, as amended, one is criminally responsible for the conduct of another if he encourages that person to engage in conduct which constitutes a criminal offense. Section 76-2-202, U.C.A., 1953, as amended, states:

"Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct."

Therefore, where one attends cockfight gaming activities prohibited under state law, he encourages the performance of illegal acts, and is liable as a principal. This law of principals is consistent with prior case law, where persons looking on and encouraging

gaming, although they do not bet, may be indicted as principals; see Fugate vs. State, 21 Tenn, (2 Humph) 397 (1841); Johnson vs. State, 36 Tenn. (4 Sneed) 614 (1857); Territory vs. Wong, 40 Hawaii 257 (1953), overruled in State vs. Abellano, 50 Hawaii 384, 441 P.2d 333 (1968); Opinion of Justices, 73 N.H. 625, 63 A. 505 (1906)

Nor is the ordinance inconsistent with state law. The Utah Legislature subsequently passed House Bill 281 in the last legislative session, and also made it a misdemeanor for any person to be a spectator at a cockfight. Sec. 76-9-301.5, U.C.A., 1953, as amended, was amended to read:

(1) It is unlawful for any person to be a spectator at an organized animal fight.

(2) For the purpose of this section only, an organized animal fight means a fight between animals for the benefit of spectators. There is no requirement that an admission fee be charged.

In summary, where the ordinance prohibits spectators from being present at a cockfight, the ordinance is not vague or indefinite so that men of reasonable intelligence must unnecessarily guess at its meaning and differ as to its application, to violate due process, State vs. Packard, 122 U. 369, 250 P.2d 561 (1953); State vs. Musser, 118 U. 537, 223 P.2d 193 (1950).

The ordinance term "spectator" is commonly found in the English language, so that no confusion to men of reasonable intelligence results to make the ordinance violative of due process. Specifically, Webster's Seventh New Collegiate Dictionary (G. & C. Merriam Co.; 1967 Chicago, Ill) at page 839, defines spectator as:

"Spectator ... one who looks on or watches; onlooker--..."

Appellant cites the State vs. Abellano case, supra, overruling the Territory vs. Wong case, supra, where the Hawaii Supreme Court, in interpreting a different set of statutes, required a spectator to be defined by ordinance as an observer within a narrow confined space before due process requirements were satisfied. Respondents submit that this interpretation would place an overly restrictive law enforcement burden on Salt Lake County where many of the cockfighting, and dogfighting events occur in isolated, outdoor, open areas, which do not accommodate succinct, spatial definition as to the location of the onlooker. Indeed, an exact spatial definition could work a hardship where an individual by chance was within the spatial zone and presumed a spectator, when in fact he was not. Respondents therefore submit that the ordinance making it a question of fact whether an individual was a spectator at a cockfight is constitutional, and not vague or indefinite where the general public knows what a spectator is; see People vs. Ramirez, 18 P.R.R. 266 (1912) where the Porto Rican Supreme Court indicated that if its legislature intended to punish a spectator, said legislative enactment would be a valid exercise of its police powers.

POINT III

THE COUNTY ORDINANCE WHICH PUNISHES SPECTATORS PRESENT AT A COCKFIGHT IS A PUBLIC WELFARE OFFENSE, WHICH REQUIRES NO MENTAL ELEMENT

For the purposes of the declaratory judgment action initiated pursuant to Sec. 78-33-2, U.C.A., 1953, as amended, challenging the validity of Sec. 16-3-28(h) of the Revised Ordinances of Salt Lake County, Utah, the County Ordinance which punishes spectators present at a cockfight is a public welfare offense, which requires no mental element.

Lake County, it is presumed that Ms. Pamela Peck was unlawfully "...present as a spectator at such fighting or baiting of a fowl" in order to have standing to bring the action. Appellant seems to ignore this presumption, by arguing that there is no evidence in the record to indicate that Ms. Peck was present as a spectator, or that she intended to be present as a spectator or that she intended to commit an offense or that she intended that others should commit an offense. Indeed, appellant is attempting to redefine the elements of the crime by making the cockfighting ordinance into an intentional crime. The county ordinance which punishes spectators present at a cockfight gaming event is a public welfare offense, which requires no mental element; Morissette vs. United States, 342 U.S. 246, 96 L.Ed 288, 72 S.Ct. 240 (1951). Where the legislature or its political subdivisions create such an offense, criminal intent in any of its forms is not an element of the crime and need not be proved to justify a conviction; People vs. McClennegen, 195 Cal. 445, 234 P.91 (1925); People vs. Del Toro, (Colo) 395 P.2d 357 (1964); People vs. Fernow, 286 Ill 627, 122 N.E. 155 (1919); Hays vs. Schueler, 107 Kan 635, 193 P. 311, 11 ALR 1433 (1920); and Haggerty vs. St. Louis Ice Mfg. & Storage Co., 143 Mo 238, 44 S.W. 1114 (1898). Due process is not violated by the fact that mens rea is not a required element of such a crime, United States vs. Green Baum (CA3 NJ), 138 F.2d 437, 152 ALR 751 (1943).

It is therefore within the power of the Board of County

Commissioners to declare an act criminal irrespective of the intent or knowledge of the doer: Chicago, B. & Q. R. Co. vs. United States, 220 U.S. 559, 55 L.Ed 582, 31 S.Ct. 612 (1911); People vs. Del Toro, supra; People vs. Johnson 288 Ill 442, 123 N.E. 543, 4 ALR 1535 (1919); State vs. Avery, 111 Kan 588, 207 P. 838, 23 ALR 453 (1922); State vs. Hales, 256 N.C. 27, 122 S.E. 2d 768, 90 ALR 2d 804 (1961); Commonwealth vs. Junkin, 170 Pa 194, 32 A. 617 (1901); Hunter vs. State, 158 Tenn 63, 12 S.W. 2d 361, 61 ALR 1148 (1929); State vs. La Bonte, 120 Vt 465, 144 A.2d 792 (1958). For a more complete analysis of the issue, see the discussion in 21 AmJur.2d §§89 and 90, discussing the above cases.

The new Utah Criminal Code, Title 76, U.C.A., 1953, as amended, specifically establishes status crimes involving strict liability to the perpetrator. Sec. 76-2-101, U.C.A., 1953, as amended, states:

"No person is guilty of an offense unless his conduct is prohibited by law and;

...; or

(2) His acts constitute an offense involving strict liability."

However, if a culpable mental state is required to violate the provisions of Sec. 16-3-28(h) of the Revised Ordinances of Salt Lake County, 1966, as amended, the necessary elements may be imputed from Sec. 76-2-103, U.C.A., which defines the mental elements necessary for intentional crimes:

"76-2-103. Definitions of "intentionally, or with intent or willfully"; "knowingly, or with knowledge"; "recklessly, or maliciously"; and "criminal negligence or criminally negligent." -

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint."

Sec. 16-3-28(h) of the Revised Ordinances of Salt Lake County, 1966, as amended, is therefore not invalid for failing to specify a mental state required to violate its provisions.

CONCLUSION

The lower court did not err in granting defendant-respondents' motion for summary judgment because the cockfighting ordinance is constitutional, and enforceable. The lower court's decision should

therefore be affirmed on appeal.

Respectfully submitted,

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