1977

State of Utah v. Dennis Loveless : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 15,511
DENNIS LOVELESS,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH HONORABLE J. DUFFY PALMER, PRESIDING

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NATURE OF THE CASE

This is a criminal appeal where the defendant Dennis Loveless was charged with and convicted of the crime of aggravated sexual assault pursuant to §76-5-405, U.C.A. (1953, as amended).

DISPOSITION IN THE LOWER COURT

This matter was tried on September 14, 1977, before the Honorable J. Duffy Palmer, Judge. The jury returned a verdict of guilty to the crime of aggravated sexual assault, a felony in the first degree, pursuant to §76-5-405, U.C.A. (1953, as amended). On the 13th day of October, 1977, the Honorable J. Duffy Palmer entered judgment and pronounced sentence thereon. Judge Palmer sentenced the defendant-appellant to a term of five years to life in the State Prison pursuant to §76-3-203(1) relating to first degree

felonies. Defendant-appellant appeals solely from the judgment and sentence of the Court and not from the convict

RELIEF SOUGHT ON APPEAL

The defendant-appellant requests this Court to vacate the judgment and sentence of the trial court and to remand this matter with directions to enter judgment and pronounce its sentence pursuant to §76-3-203(2) relating to a second degree felony and not as to a first degree felony.

STATEMENT OF FACTS

As appellant is appealing only from the judgment and sentence of the Court, the facts as to the conduct of the appellant regarding this crime are not in issue. Suffice it to say, that the defendant was charged and convicted by a jury of having intercourse with a woman not his wife under the age of 14. The indictment was brought under §76-5-405, U.C.A., Aggravated Sexual Assault, as the laws of the State of Utah stood February 6, 1977. Aggravated sexual assault is a felony in the first degree. The sentence of the Court was pronounced on the basis of a first degree felony. At that time, the crime of rape, §76-5-402, U.C.A., (1953, as amended), also included the exact conduct with which the appellant was charged. Rape was a felony of the second degree. Copies of the statutes as they stood in February 1977 are attached in the appendix. The 1977 session of the Utah Legislature amended these two sections to remove this inconsistancy. These amendments did not go into affect

until after April 1, 1977. Copies of these sections after the amendments were made are also attached in the appendix.

POINT I

WHERE THERE ARE TWO STATUTES WHICH PROSCRIBE THE SAME CONDUCT BUT IMPOSE DIFFERENT PENALTIES, THE VIOLATOR IS ENTITLED TO BE PUNISHED IN ACCORDANCE WITH THE LESSOR PENALTY.

The appellant was charged in the information upon which he was convicted with the following specific conduct:

> On or about the 6th day of February, 1977, at Farmington, County of Davis, State of Utah, the above defendant did have sexual intercourse with a female, not his wife, to wit: Brenda Winnett, under the age of 14. (R. 1).

The information denominated the crime being charged as Aggravated Sexual Assault, pursuant to §76-5-405, U.C.A. The conduct described in the information, however, is proscribed in identical terms by two separate statutes as they existed in February of 1977, when this act took place. The two sections are the section on Aggravated Sexual Assault, 76-5-405 (Appendix page 1), and the section on Rape, 76-5-402 (Appendix page 1). The very words describing the defendant's conduct in the information are the words used by the rape statute and the consent statute to define rape. The rape statute, 76-5-402, states:

> A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent.

"Without her consent" is defined in §76-5-406(7) (Appendix Page 3), as when:

> (7) The victim is under 14 years of age.

Rape under these circumstances was a felony in the second degree, §76-5-402, U.C.A.

The exact same conduct was also defined as aggravated sexual assault pursuant to 76-5-405, U.C.A. (Appendix page The pertinent language from that section is as follows:

> 76-5-405 AGGRAVATED SEXUAL ASSAULT-
> (1) A person commits aggravated sexual assault if: . . .
> (b) The victim of a rape . . . is under 14 years of age.

That section, however, describes this conduct as a felony the first degree.

The conduct with which appellant was charged was thus, prohibited by two statutes in identical terms, one making the conduct a felony in the second degree, the other makin the conduct a felony in the first degree. There is, of course, other conduct defined by the aggravated sexual assault statutes which is not included in the rape statute. The information with which appellant was charged, however, specified none of the additional conduct proscribed by the aggravated sexual assault statute. In fact, the conduct described by the information used the wording of the rape statute and not the wording of the aggravated sexual assa statute.

The law in Utah is clear that where the same conduc proscribed by two statutes which would impose different

penalties, the defendant is entitled to be sentenced according to the lesser penalty. The recent Utah case of Rammell v. Smith, 560 P.2d 1108 (Utah 1977) states this premise clearly.

> Proceeding to the main issue in this case; we agree with petitioners premise that where there are two statutes which proscribe the same conduct but impose different penalties, the violator is entitled to the lesser. 560 P.2d 1108.

That case dealt with charges under the Utah Controlled Substances Act which overlapped to some extent provisions of the Pharmacists Act. The Court in that case concluded that the conduct proscribed by the one was not identical to the conduct proscribed by the other and that the Controlled Substances Act applied more specifically to the conduct with which the defendant was charged than the Pharmacists Act. The Supreme Court also pointed to a provision in the Controlled Substances Act that specifically required the Court to apply the Controlled Substances Act when there appeared to be any conflict with the Pharmacists Act.

In the instant case, the conduct with which the defendant is charged is identically proscribed by two statutes. One making the conduct a felony in the second degree, the other making the conduct a felony in the first degree. When the defendant was sentenced, he was sentenced by the trial court as follows:

> It is the sentence of the Court that Dennis Loveless be committed to the State Penitentiary to serve a period of from 5 years to

> life. (Transcript, page 9. The record has not been numbered by the Clerk beyond the 1st page of the transcript which is numbered, record page 8.)

This sentence was imposed pursuant to §76-3-203(1), U.C.A. (1953, as amended) which states in pertinent part as follows:

> (1) In the case of a felony of the first degree, for a term at not less than 5 years and which may be for life;

The same code section provides the maximum permissible penalty for a felony of the second degree as follows:

> (2) In the case of a felony of the second degree, for a term at not less than 1 year nor more than 15;

The sentence imposed by the trial court could not have been imposed if the Court were sentencing pursuant to the second degree felony conviction as required by Rammell v. Smith, supra. This Court should remand the case to the trial court for re-sentencing as a second degree felony pursuant to §76-3-203(2). See also State v. Fair, 23 Utah 2d 34, 465 P.2d 168 (1969) and State v. Shondell, 22 Utah 2d 343, 453 P.2d 146 (1969).

As a post script, it might be noted by the Court that in the 1977 session of the Utah State Legislature, the duplicate nature of the two offenses, aggravated sexual assault, and rape, were corrected. (See Appendix page 21). The conduct charged in the information would now come only under the rape statute and would no longer fit under the aggravated sexual assault statute. The rape statute, however, has also been amended to include both first and

second degree felonies. These amendments took place after the date of the conduct with which the appellant is charged.

CONCLUSION

The exact conduct with which defendant was charged and convicted was proscribed by two separate statutes; one making the conduct a felony in the second degree, the other making the conduct a felony in the first degree. The trial court sentenced the defendant pursuant to a felony in the first degree. The sentence the trial court meaded out would not be permissible if it were sentencing pursuant to a felony in the second degree. Under these circumstances, this Court should remand this case to the trial court for re-sentencing pursuant to §76-3-203(2) U.C.A. regarding sentences for felonies in the second degree.

Respectfully submitted this 27th day of December, 1977.

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MAILED a copy of the foregoing Brief of Appellant to Steven C. Vanderlinden, Deputy County Attorney, Davis County Courthouse, Farmington, Utah 84025, this 27th day of December, 1977.

Marianne Peterson
SECRETARY

From 1973 Pocket part to Volume 8 U.C.A. - In effect until amendments from 1977 session of Legislature went into effect (Sometime after April 1, 1977).

76-5-402. Rape.—(1) A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent.

(2) Rape is a felony of the second degree.

History: C. 1953, 76-5-402, enacted by L. 1973, ch. 196, § 76-5-402.

76-5-405. Aggravated sexual assault.—(1) A person commits aggravated sexual assault if:

(a) In the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy:

(i) The actor causes serious bodily injury to the victim; or

(ii) The actor compels submission to the rape or forcible sodomy by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person.

(b) The victim of a rape or attempted rape or sodomy or attempted sodomy is under fourteen years of age.

(2) Aggravated sexual assault is a felony of the first degree.

History: C. 1953, 76-5-405, enacted by L. 1973, ch. 196, § 76-5-405.

From 1977 yellow supplement to Volume 8, U.C.A. In effect sometime after April 1, 1977.

76-5-402. Rape.—(1) A male person commits rape when he has sexual intercourse with a female, not his wife, without her consent.

(2) Rape is a felony of the second degree unless the victim is under the age of 14, in which case the offense is punishable as a felony of the first degree.

History: C. 1953, 76-5-402, enacted by L. 1973, ch. 196, § 76-5-402; L. 1977, ch. 86, § 1.

Compiler's Notes.

The 1977 amendment added "unless the victim * * * first degree" to subsec. (2).

76-5-405. Aggravated sexual assault.—(1) A person commits aggravated sexual assault if:

(a) In the course of a rape or attempted rape or forcible sodomy or attempted forcible sodomy:

(i) The actor causes serious bodily injury to the victim; or

(ii) The actor compels submission to the rape or forcible sodomy by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person.

(2) Aggravated sexual assault is a felony of the first degree.

History: C. 1953, 76-5-405, enacted by L. 1973, ch. 196, § 76-5-405; L. 1977, ch. 86, § 4.

Compiler's Notes.

The 1977 amendment deleted former subd. (1) (b) which read: "The victim of a rape or attempted rape or sodomy or attempted sodomy is under fourteen years of age."

From 1977 yellow supplement to Volume 8, U.C.A. In effect prior to date of crime herein and not amended by 1977 sess. of Legislature.

76-5-406. Sexual intercourse, sodomy, or sexual abuse without consent of victim—Circumstances.—An act of sexual intercourse, sodomy, or sexual abuse is without consent of the victim under any of the following circumstances:

(1) When the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

(2) The actor compels the victim to submit or participate by any threat that would prevent resistance by a person of ordinary resolution; or

(3) The victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist; or

(4) The actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it; or

(5) The actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse; or

(6) The actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without his or her knowledge; or

(7) The victim is under fourteen years of age.

History: C. 1953, 76-5-406, enacted by L. 1973, ch. 196, § 76-5-406.