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State of Utah v. Dennis Blaine Angus : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

FEB 27 1978

STATE OF UTAH,

Clerk, Supreme Court, Utah

Plaintiff and
Respondent,

:

vs.

:

No. 15525

DENNIS BLAINE ANGUS,

:

Defendant and
Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the
FOURTH DISTRICT COURT FOR UTAH COUNTY
Honorable Allen B. Sorensen, Judge

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STATEMENT OF KIND OF CASE

This is a criminal prosecution for aggravated assault, involving the shooting of the victim on the highway with enhancement of sentence for use of a firearm or facsimile in commission of a felony.

DISPOSITION IN LOWER COURT

The aggravated assault case was tried to a jury who convicted the Appellant of aggravated assault. The trial judge made a finding of use of a firearm and invoked the enhancement provision of the penalty statute. From the verdict and judgment of conviction and commitment on the enhancement statute Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment of conviction, an order remanding for new trial, suppressing use of the .22 caliber pistol in evidence or alternately, remand for evidentiary hearing on suppression and/or that the commitment on the enhancement provision of Utah Code Annotated §76-3-203 be vacated.

STATEMENT OF FACTS

On the 20th day of July, 1977, Clyde Davies was driving a truck southbound on I-15 near Santaquin, Utah, when he was shot. The driver of a truck following him heard a loud noise at about the same time and observed a white van on the northbound side of the highway. Defendant was stopped and detained leaving I-15 in his white van, and a search of

the van was conducted, turning up a .22 caliber pistol and a number of empty shell casings. The Defendant was tried and convicted of the charge of aggravated assault before a jury. The information made no reference to the enhancement provision of the penalty statute for use of a firearm. The jury was not provided with a verdict form on the enhancement provision and the essential elements of the crime as charged, did not include an element on the use of a firearm. At sentencing, the trial judge made a finding that a firearm had been used and invoked the enhancement provisions, sentencing the Defendant to two consecutive sentences of not less than five years in prison.

ARGUMENT

I. THE SEARCH OF THE DEFENDANT'S VEHICLE WAS CONDUCTED WITHOUT PROBABLE CAUSE, PRIOR TO ARREST, AND WITHOUT THE CONSENT OF THE APPELLANT, AND ALL EVIDENCE OBTAINED IN THE SEARCH SHOULD HAVE BEEN SUPPRESSED.

Sometime shortly following the shooting of Mr. Davies, the Appellant was stopped on the highway and a search was conducted of his vehicle. This search revealed a .22 caliber pistol in the rear portion of the van that became the primary evidence against him in trial. The problem then becomes to determine the authority under which the search was conducted and whether it meets the standards prescribed for warrantless searches under the Fourth and Fourteenth Amendments to the Constitution.

Searches conducted outside the judicial process without prior approval by a judge or magistrate are, per se, unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357 19 1Ed 2d 576, 583.

The burden is on those seeking exemption to show the need for it. United States v. Jeffers, 342 U.S. 48, 41, 96 LEd 59, 64.

One exception is a search incident to an arrest. In order for a search incident to an arrest to stand, the arresting officer must have sufficient probable cause to arrest the Defendant, must lawfully effectuate the arrest, and must place the Defendant in custody. Gustafson v. Florida, 414 U.S. 260. While in the present case the person of the Defendant was seized and detained, and he may well be considered to have been in custody, there existed neither probable cause for an arrest nor the lawful effectuation of an arrest. In order to judge the probable cause for arrest, probable cause must be judged solely on that information and evidence available to the arresting officer at the time the Appellant's vehicle was stopped. The arresting officer may not rely upon evidence obtained in a search conducted after the arrest in order to provide probable cause for the arrest. Henry v. United States, 361 U.S. 98; Rios v. United States, 364 U.S. 253; Whiteley v. Warden of Wyoming State Penetentiary, 401 U.S. 560. We must, then consider what knowledge was available to the arresting officer when he stopped Appellant and "detained" him for "investigation". The officer was aware that someone (Mr. Davies) had been injured and probably shot. He was aware that the shooting had taken place a short distance away on Interstate Highway 15. He was aware that another person (Mr. Child) had heard a loud noise at about the same time that Mr. Davies was shot, and that he had observed a white van heading the opposite direction on the Interstate. This information is further supported by another report of a loud noise and that a cream colored van was across the highway at that time. There was no information on any persons within the van or vans and nothing out of the ordinary about the conduct of the van or its driver or any passengers. There is not even a

strong inference that the shots were fired from a vehicle, let alone the white van. However, it is certainly reasonable that the police officers, upon being informed that someone had been shot and additionally advised that at that time a white van was across the highway with some corroborative in another report of a loud noise coupled with the proximity of a cream van, that the police would attempt to locate any white or cream vans in the area in order to question the driver and any passengers, and at least ascertain their identity. But no magistrate would issue a warrant of arrest or allow a complaint to stand based upon such evidence, and accordingly, there was not sufficient probable cause to arrest Appellant and any search incident to such arrest is defective and testimony with regards thereto and evidence located must be suppressed.

It is additionally questionable whether the Appellant was in fact arrested by the officer. When he was stopped, Officer Bradford did not advise him he was under arrest, but told him he was being "...detained while we investigate the situation" (transcript page 49, lines 6-7) This would seem to demonstrate that Officer Bradford knew there was no probable cause for arrest at that time, and did not then intend to arrest.

Even though there was not sufficient probable cause to arrest, this would not prohibit the Appellant being stopped for investigation. Employing the principles of good police work, Officer Bradford knew that a driver of a white van may have been involved in criminal conduct. He could, therefore, stop a white van in the area of a crime, and could conduct a search of the person of the driver of the vehicle. Terry v. Ohio, 392 U.S. 1; Sibron v. New York, 392 U.S. 40; Adams v. Williams, 407 U.S. 143. But the purpose of this type of search "...is not to discover evidence of a crime but to

allow the officer to pursue his investigation without fear of violence." Adams v. Williams, supra at 146. Accordingly, the scope of such a "stop and frisk" search is limited to the individual and such limited surroundings as are reasonably necessary to protect the safety of the officer. Terry v. Ohio, supra; Adams v. Williams, supra. The arresting officer might then search the person of the Appellant for weapons and look into the van to ascertain it held no other persons, but, the .22 caliber pistol which was discovered in the rear of the van, and out of sight, was well beyond the scope of such a search. Officer Bradford testified "I really had to look hard, but finally found it..." (Transcript page 44, lines 4 and 5) There can, then, be no pretense that the officer's search was for the purpose of protecting his person and guarding against possible physical harm by the Appellant.

Another exception allows police to make a warrantless search of a motor vehicle even when it is not incident to arrest, and where there may not be probable cause to arrest, if they have probable cause to justify the search. Carol v. United States, 267 U.S. 132; Chambers v. Maroney, 399 U.S. 42. While this is tantamount to an ex post facto type of warrant, it is justified upon the transitory nature of vehicles. Chambers, supra. The difference in probable cause required for search of a vehicle is applied to the vehicle in much the same way probable cause for arrest is applied to an individual. In Chambers, the court provided that the similarity of vehicle descriptions including partial descriptions of the occupants, gave probable cause to search the vehicle. But there was a great deal more in that case to distinguish the vehicle from all others on the road besides its color and type as in the instant case. There were four persons in the suspect vehicle, four in the stopped vehicle. The clothing of some of the passengers matched that of some

of the suspects. But the greatest difference is that in Chambers, the vehicle description was of a vehicle known to have been involved in the crime not just in the area of the crime.

If the description of a person committing a crime was broadcast, a person answering that description might be arrested, but if the description was merely that of a person seen in the area of the crime, there would not be probable cause for an arrest.

It is an exception to the requirement for probable cause for a search that the Defendant may consent to the conduct of the search. Davis v. United States, 328 U.S. 582; Zat v. United States, 328 U.S. 624; Katz v. United States, 389 U.S. 347.

Officer Bradford claims that he conducted the search with the consent of the Appellant. After stopping the Appellant, he was ordered from the van by loud speaker, told to place his hands on the van and was searched. He was informed by Officer Bradford that he was going to be "detained" and that his van was going to be searched. (See Transcript page 48 lines 23-25) He was not advised of his rights or informed that he could refuse the search. The Appellant did not consent to the search, but merely consented to authority. This is not consent, and cannot make an unlawful search lawful. Bumper v. North Carolina, 391 U.S. 543, 20 LEd 2 797.

The .22 caliber pistol was seized in an unlawful search and should be suppressed, and Appellant's conviction reversed or remanded for an evidentiary hearing to determine if the evidence of the search should be suppressed.

II. UTAH CODE ANNOTATED §76-3-203 APPLIES TWO SEPARATE SENTENCES FOR THE SAME CRIMINAL ACT, AND, THEREFORE, IMPOSES DOUBLE PUNISHMENT, PROHIBITED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is long established doctrine that the Fifth Amendment not only protects against being twice tried for the same offense, but prohibits double punishment. Ex Parte Lange, 18 Wall 163, 21 LEd 872; United States v. Ewell, 383 U.S. 116; North Carolina v. Pearce, 395 U.S. 711. This is applied to the States by the Fourteenth Amendment Benton v. Maryland, 395 U.S. 784.

In providing a statutory scheme for enhancement of sentence for use of a firearm in the commission of a crime Utah Code Annotated 76-3-203 chooses rather than enlarging the basic sentence to provide for an entirely separate and distinct sentence. One that does not begin to run until the Defendant has completed serving the sentence for the crime itself.

There is some precedence that multiple punishments may constitutionally be imposed as the consequence of a single criminal, but only if they constitute separate statutory offenses. Blockburger v. United States, 234 U.S. 299. In the instant case, the Appellant was charged and tried for only one statutory offense, but was sentenced to two separate and consecutive sentences of not to exceed five years, and the second sentence of not to exceed five years should be vacated.

III. FAILURE TO PROVIDE REASONABLE NOTICE OF THE INTENT TO INVOKE THE ENHANCEMENT PROVISIONS OF UTAH CODE ANNOTATED §76-3-203 DENIED APPELLANT DUE PROCESS OF LAW.

At no point in the proceeding arraignment, preliminary hearing, district court arraignment or trial did the Appellant receive any notice or warning of either the existence of or any intention of the state to proceed upon the firearm enhancement provisions of Utah Code Annotated §76-3-203, in fact, the record is silent with regard to either this section or its special

potential until sentencing. Accordingly, the Defendant was afforded no reasonable notice and opportunity either at trial or later to confront the issues involved in the enhancement statute, or to plan his strategy and bargain plea based on a realization of the full potential of his exposure. Failure to provide the Defendant reasonable notice is a denial of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States. Cyler v. Boles, 368 U.S. 448.

IV. FAILURE TO PROVIDE OPPORTUNITY FOR A FINDING SPECIFICALLY ON THE USE OF A FIREARM OR FACSIMILE AS OPPOSED TO A DEADLY WEAPON EITHER THROUGH AN ELEMENT TO THE OFFENSE OR VERDICT CONSTITUTES FAILURE TO INVOKE THAT SECTION.

The State, through the County Attorney, has a broad discretion in determining what a Defendant will have to answer. Each criminal act is usually surrounded with a myriad of potentials for criminal prosecution. The County Attorney is charged with reviewing these potentials, and charging those that can best be proved and that best fit the situation. It is an affirmative duty on the part of the State to advise the Defendant of those charges it intends to prove.

The State of California, which has a similar use of a firearm statute (California Penal Code Section 12022.5) has ruled that unless the State takes affirmative action to indicate its choice to pursue the enhancement provision at trial, it may not be invoked at sentencing and is waived. People v. Najera, 503 P2d 1353 (Cal. 1972) (quoting from People v. Spanish 99 Cal Rptr 681, 691, S. Cal. App. 3d 736, 302) the Court states:

"It seems not unreasonable to hold that the failure of the prosecution to request either the necessary jury instruction, or the submission of the requisite

special verdict, should be taken as an indication that Section 12022.5 has not been invoked." Id at 1358.

The language of Utah Code Annotated §76-3-203 is specific in its requirement for a "finding" by the jury that a "firearm or facsimile or representation of a firearm" was utilized in the commission or furtherance of the crime. This creates a new and additional element that is an essential element to the application of the enhancement provision. When the court in the instant case instructed the jury in its Instruction No. 5 no element on the use of a firearm or facsimile thereof was included. The jury was required to find only that a dangerous weapon as required by the aggravated assault statute was used. Utah Code Annotated §76-5-103.

Failure to so instruct denied the Appellant the right to a finding he was entitled to by the statute before its full force and effect could be brought to bare against him.

The case should either be remanded for new trial on all issues or the State deemed to have waived invocation of the enhancement provision and the sentence thereon declared void and vacated.

V. UTAH CODE ANNOTATED §76-3-203 CREATES A SEPARATE AND DISTINGUISHABLE OFFENSE WHICH MUST BE PLED AS A SEPARATE CHARGE TO BE INVOKED.

The enhancement provision for use of a firearm is contained within the penalty provision of the criminal code, and further listed as an adjunct to the description of the felony involved. The provisions of that Section specifically provide for a separate and distinguishable sentence rather than an enlargement of the otherwise provided sentence. Accordingly, the enhancement portion of the statute would seem to provide a separate and

distinguishable criminal offense.

The Federal Omnibus Crime Control and Safe Streets Acts of 1968, provides enhancement of sentence for being armed with a firearm in the commission of a federal crime. This provision, like Utah's, being found within the punishment of the code. 18 U.S.C. §924(c). Although the federal law is distinguishable in that it enlarges the basic sentence rather than providing a separate sentence, the Tenth Circuit Court of Appeals has construed the federal law to provide a separate offense which must be charged as a separate count to the information. United States v. Sudduth, 457 F2d 1198, 25 ALR Fed. 671. Further, holding that an enhanced sentence predicated on the firearm provision alone could not be imposed on an indictment charging only an independent felony. United States v. Vigil, 458 F2d 385 (CA 10 1972). The Federal Omnibus Act has also been construed to create separate crimes by the Second Circuit in United States v. Ramirez, 482 F2d 807 (CA 2 1973) cert den 414 U.S. 1070.

It would seem that the legislature in setting an additional sentence separate and apart from that carried by the basic charge probably envisioned a separate crime as the federal law has been interpreted, one that would have to be charged before it could be invoked, one that would have to provide a Defendant of reasonable notice of its intended use as required by Oyler v. Boles, supra, and one upon which the Defendant is entitled to a specific jury instruction and elements for the crime and a verdict by the jury on that issue. Accordingly, the sentence of the Appellant on the enhancement statute should be vacated.

VI. THE FINDINGS OF FACT REQUIRED BY UTAH CODE ANNOTATED §76-3-203(3) WAS MADE BY THE JUDGE RATHER THAN THE JURY AND DENIED APPELLANT HIS RIGHT TO TRIAL BY JURY.

The enhancement portion of Utah Code Annotated §76-3-203 requires that there be a finding by the trier of fact with regards to the utilization of the firearm. It is well settled that in any case involving criminal conduct where a jury is present, that the finder of fact is the jury. In the instant case, as discussed above, there was no element included in the charge that made a separate and distinguishable finding that a firearm or facsimile was used, neither was there a verdict, special or otherwise, employed to make a finding as required by the statute. This seems to be recognized by the trial judge in the language of the commitment. The commitment of the Court issued on the 28th day of October, 1977, sentences the Defendant to a term in the Utah State Prison of not to exceed five years for the underlying charge of aggravated assault, but goes on: "in addition thereto, the Court finds that a firearm was used in the commission of the crime, and therefore, under the provisions of §76-3-203(3) of the criminal code, the Defendant is sentenced to an additional term not to exceed five years. Sentence to run consecutively, not concurrently." (emphasis added) Accordingly, the Court by its own language has made its own independent finding of what must be a specific element of the crime, and has thereby usurped the function and duty of the jury. People v. Najera, 503 P^{2d} 1353 (Cal 1972) Appellant was not provided a finding by the jury on an essential issue of fact, this finding cannot be made by the Court no matter how compelling it may seem and may not be inferred from the general verdict of the jury.

Appellant was entitled to a specific finding which finding was denied him and his conviction should be reversed.

CONCLUSIONS

I

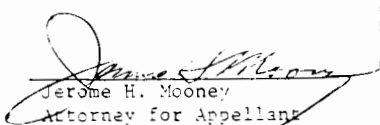
The search of Defendant's vehicle was in violation of his rights under the Fourth Amendment. The gun seized in the search should have been suppressed, and Defendant's conviction for aggravated assault should be reversed.

Alternately, as the issue of protection against unlawful search and seizure is so fundamental to American jurisprudence and as the issue was not clearly dealt with in the lower court, the case should be remanded for an evidentiary hearing on the suppression issue.

II

The enhancement provisions of Utah Code Annotated §76-3-203 is an unconstitutional imposition of double punishment and Defendant's conviction therefore, should be reversed.

Alternately, the failure to plead or otherwise put the question of the enhancement provision at issue was either a choice not to invoke by the State or denies Appellant due process of law. It was improper for the judge on his own to invoke the provision, make his own finding exclusive of the jury and impose sentence thereon. The sentence on the enhancement provision should be reversed and vacated.


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