1997

Gary Lee Kingston v. State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GARY LEE KINGSTON,	:	
Defendant/Appellant,	:	Case No. 970485-CA
v.	:	Priority No. 2
STATE OF UTAH,	:	
Plaintiff/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM A JUDGEMENT AND COMMITMENT FOR
CONSPIRACY TO COMMIT AGGRAVATED ROBBERY
A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN.
§ 76-4-201, ENTERED IN THE THIRD DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH,
THE HONORABLE JUDGE WILLIAM B. BOILING, PRESIDING

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

STATE PROCEDURAL RULES

CONSTITUTIONAL PROVISIONS

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GARY LEE KINGSTON,	:	
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BRIEF OF APPELLANT

JURISDICTION

This is an appeal from a judgement and commitment for conspiracy to commit aggravated robbery, a second degree felony, in violation of Utah Code Ann. §76-4-201 and §76-6-302, entered in the Third District Court, Summit County, State of Utah.

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(e) (1996) and Rule 3 of the Utah Rules of Appellate Procedure.

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

Did the trial court err when it admitted evidence under the coconspirator exception to the hearsay rule, 801(d)(2)(E)?

A verdict based on inadmissable evidence should be overturned if the evidence admitted was so prejudicial that "there is a reasonable likelihood of a more favorable result for the defendant in its absence." State v. Chavez, 840 P.2d 846, 847-8 (Utah App.1992), quoting State v. Featherson, 781 P.2d 424, 431 (Utah 1989).

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional statutory provisions are believed to be determinative of the issue raised in this appeal:

The Sixth Amendment to the United States Constitution provides:

[**Rights of accused**.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by the law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.
(emphasis added).

Article I, §12, of the Utah State Constitution provides:

[**Rights of accused persons**.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.....
(emphasis added).

STATEMENT OF THE CASE

Defendant was convicted by a jury on June 13, 1997, of one count of conspiracy to commit aggravated robbery, a second degree felony, in violation of Utah Code Ann. §§ 76-4-201 and 76-6-302. Defendant was sentenced on July 28, 1997, to an indeterminate period of one to fifteen years in prison and fined $10,000.00. The Judgement and Commitment was entered on July 30, 1997. However, the Order had to

be amended and a subsequent Judgment and Commitment was entered on August 27, 1997. A notice of appeal was originally filed on August 11, 1997 and it was renewed after the Amended Judgment and Commitment and was filed on September 2, 1997.

STATEMENT OF FACTS

In January of 1997, Gary Lee Kingston, the defendant/appellant and Michael Clay were seen standing by a dumpster outside of First Security Bank in Park City by Valerie Kim Strait, a resident of Park City (R. 14-17). The two men caught her attention because they seemed out of place for that area. The men were standing in the cold, smoking cigarettes and looked as though they were trying to keep warm (R. 19).

The next day Kim Strait saw the same two men, doing the same things, wearing the same clothes and acting strange (R. 20). Ms. Strait went into the U.S. ski team offices, told them about the two men and subsequently the police were called to investigate (R. 25-32).

Police officer Sherman Farnsworth was dispatched to the bank to investigate the two men. When the officer arrived at the bank he approached Kingston and Clay. Mr. Kingston left the area and walked toward the Ski Team office (R. 35). Officer Farnsworth told Kingston to stop walking. When the officer stopped Mr. Kingston, he had him walk back to him for questioning (R. 36). Both Kingston and Clay were wearing multiple layers of clothing (R. 51) and Mr. Clay had a can of mace on his person (R. 46). The officer testified that once he arrived at the scene, Mr. Kingston

never left his sight (R. 56, Line 2), that Mr. Kingston had his hands in his pockets (R. 56, Line 23) and never had a weapon on him (R. 57, Lines 15-23).

Wesley Gillmore, a cell mate of Mr. Kingston's in the Summit County Jail testified that while in jail, Mr. Kingston confessed the crime to him and told him that Michael Clay, his partner had a fake gun on him (R. 79). Craig Coombs, another cell mate of Mr. Kingston testified that Kingston confessed to the crime and that he had a real gun and he and Coombs drew a map of where the gun was hidden in a snow bank (R. 87). Officer Farnsworth testified that after Coombs told him about the gun and the map, the officer went to the snowbank and searched the area but found no gun (R. 72).

The coconspirator, Michael Clay testified that although Mr. Kingston did not have a gun (R. 121), it was Mr. Kingston's idea to take the mace and have Clay carry it (R. 111). Clay testified that a third conspirator, Anthony, told Clay to carry a BB gun to frighten anyone who followed them (R. 111). Clay testified that he did not believe the mace or the BB gun were illegal (R. 120). Clay stated he would not have been involved in the robbery if there were weapons involved (R. 112).

SUMMARY OF THE ARGUMENT

Counsel objected to the testimony of the coconspirator, Michael Clay, prior to his testimony, (R. 99), on the basis that under the Utah Rules of Evidence, 801(d)(2)(E), the evidence necessary to show that Mr. Kingston, by a preponderance of the evidence, had conspired to commit an aggravated robbery with Mr. Clay. The court held in its findings that by a preponderance of the evidence the burden had been met

as to the conspiracy, however, no finding was made as to the aggravated portion of the conspiracy. On that basis defendant asserts that the testimony of Michael Clay regarding the weapon was inadmissable and that his conviction for conspiracy to commit aggravated robbery should be vacated or reduced to conspiracy to commit robbery.

ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING THE AGGRAVATING FACTOR OF A WEAPON UNDER THE COCONSPIRATOR EXCEPTION TO HEARSAY RULE

Rule 801(d)(2)(E) provides that a statement is not hearsay and therefore admissible (if not barred under other evidentiary provisions) if the statement is offered against a party and is a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. Utah Rules of Evidence, Rule 801(d)(2)(E).

However, before the State can utilize 801(d)(2)(E), it must produce by a preponderance of the evidence, independent and exclusive of the conspirator's hearsay statements themselves, the existence of a criminal joint venture and the defendant's participation in it. "Independent evidence of the declarant's membership in the criminal venture is also required." State v. Gray, 717 P.2d 1313, 1318 (Utah 1986) (footnotes omitted).

After counsel for Mr. Kingston objected to Clay being called to testify, the trial court made specific findings of fact regarding the existence of a joint criminal venture and defendant's participation therein:

> The Court finds from the following evidence, both direct and circumstantial evidence the existence of the criminal conspiracy: The loitering of the defendant and the coconspirator in front of the bank over a two-day period, the defendant's flight at the appearance of a police officer, the inconsistent stories of the defendant and the alleged coconspirator given separate handling by the police officers at the scene, the presence of weapons on the person of the alleged coconspirator, presence of multiple layers of clothing on both the defendant and the alleged coconspirator to suggest not simply bundling up for the cold, but some other purpose because of the extensive layering that was done, and the fact that both seemed to be consistent in their actions; and perhaps most convincingly, the defendant's statement to two separate inmates that he and an alleged coconspirator had been planning to rob the bank or someone carrying a bag of money from the bank.
>
> The Court believes that the force and effect of all of these separate statements and other evidences that have been brought into this case establish more likely than not that there was an existence of the criminal conspiracy independently of any testimony of the conspirator and that the threshold has therefore been met under Rule 801(d)(2)(e) to allow the testimony of the alleged conspirator.

(R. 104-105).

Although the court's facts are reviewed under a clearly erroneous standard and will not be overturned unless they are "against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has

been made...." State v. Walker, 743 P.2d 191, 193 (Utah 1987), counsel asserts that the lack of discussion regarding the weapon--the aggravating factor in the conspiracy--in the judge's findings warrant a review by this Court.

In a conspiracy, the penalty is dropped one level from what it would be had the offense actually been committed, see Utah Code Ann. § 76-4-202 (1996). A person is guilty of a conspiracy when:

...[I]ntending that conduct constituting a crime be performed, agrees with one or more persons to engage in or cause the performance of such conduct and any one of them commits an overt act in pursuance of the conspiracy, except where the offense is a ,,, felony against a person....

Utah Code Ann. §76-4-201 (1974).

Mr. Kingston could only be found guilty of Robbery under the Utah Code if there is no supporting evidence that he used or threatened to use a dangerous weapon. See Utah Code Ann. § 76-6-301 and 302.

The only reasonably reliable evidence introduced at trial to show that Mr. Kingston had any knowledge of, or participation in the planning of the use of the mace or the BB gun was the testimony by Clay. Such testimony was introduced without any independent or reliable evidence that Mr. Kingston had any knowledge of the possession of those items by Clay.

On that basis, Kingston asserts that in relation to the weapon, he did not possess one and the only evidence that he knew the BB gun and mace were gong to be part of the plan is the unreliable "hearsay" testimony of Clay, a coconspirator.

Valerie Strait and officer Farnsworth both testified that they did not see Mr. Kingston with a gun or a weapon. Although one cell mate stated that Kingston told him he had a gun, his story is not supported by the evidence. No gun was found in the snow bank. Moreover, the other cell mate testified that Kingston told him he did not have a gun. The only link that ties Kingston with the plan for someone in the conspiracy to carry the BB gun or mace, is Clay. As there was no independent evidence that Kingston knew the mace and BB gun were going to be used, Clay's testimony should not be admissible.[1]

Kingston asserts that without Clay's testimony the most he could be found guilty of is a third degree felony for conspiracy to commit robbery. To allow Clay's testimony into court that it was Kingston's idea to take the mace to the bank produces a result that otherwise would not have occurred. Without Clay's testimony, there is no supporting evidence that Kingston even knew any weapon or mace would be there that afternoon. It is highly likely a different verdict, one of a third degree felony, would have occurred if Clay had not been allowed to testify about the mace and BB gun.

A verdict based on inadmissable evidence should be overturned if the evidence admitted was so prejudicial that "there is a reasonable likelihood of a more favorable result for the defendant in its absence." State v. Chavez, 840 P.2d 846, 847-8 (Utah App.1992), quoting State v. Featherson, 781 P.2d 424, 431 (Utah 1989).

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[1]In the event the testimony of Clay is deemed admissible, Defendant asserts that as he did not actually possess the mace or BB gun, nor ever possess a weapon of any type, dangerous or not, that he is only guilty of conspiracy to commit robbery, a third degree felony and his conviction should be amended.

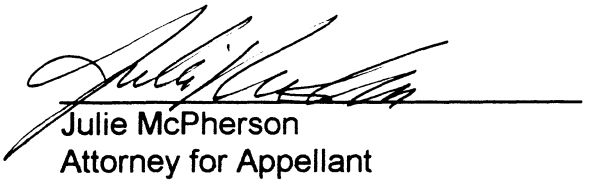
ORAL ARGUMENT; PUBLICATION OF OPINION

The Appellant does not request oral argument or a published opinion in this case.

CONCLUSION

Based upon the foregoing arguments the Appellant requests that this Court vacate his conviction for aggravated conspiracy to commit robbery, a second degree felony and either order a new trial or enter a conviction for conspiracy to commit robbery, a third degree felony.

DATED this 2nd day of January, 1998.



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MAILING CERTIFICATE

I hereby certify that I hand-delivered or mailed, first class postage prepaid, a true and correct copy of the foregoing brief to:

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Dated this 2nd day of June 1998.