

1978

State of Utah v. Peter Leonard Lyon : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH, :
 :
 Plaintiff and :
 Respondent, :
 :
 vs. : Case No. ~~12474~~
 : 15606
 PETER LEONARD LYON, :
 :
 Defendant and :
 Appellant. :
 :

BRIEF OF APPELLANT

Appeal from the Judgment of the Second
Judicial District Court of Weber County,
Utah, Honorable John F. Wahlquist, Judge

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FILED

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CLERK OF SUPREME COURT

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff and	:	
Respondent,	:	
vs.	:	Case No. 12474
PETER LEONARD LYON,	:	
Defendant and	:	
Appellant.	:	

BRIEF OF APPELLANT

NATURE OF CASE

This is a criminal action for failure to stop a vehicle at the command of a police officer, commonly known as "evading a police officer", a violation of §41-6-169.10, U.C.A., 1953.

DISPOSITION IN LOWER COURT

Appellant was convicted upon a jury verdict of guilty of the offense of evading a police officer.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment of conviction entered against him.

STATEMENT OF FACTS

On July 27, 1977, at 4:00 a.m., Weber State College Security Officer Terry Carpenter was en route from the main campus to patrol the new Dee Events Center. (T.3). The Dee Events Center is not contiguous to the main campus but is located approximately four blocks to the south. (T.5).

Mr. Carpenter observed Appellant on a motorcycle stopped at the intersection of Taylor Avenue and Country Hills Drive. (T.6). The intersection is located in a residential district approximately equidistant from the main campus and the Dee Events Center. (Exh. D-1). Taylor Avenue jogs as it intersects with Country Hills Drive and, as Mr. Carpenter approached the intersection from the north, he first observed Appellant from a distance of approximately one-half block. (T.30).

Appellant testified that his motorcycle had killed as he stopped at the stop sign at Country Hills Drive. He used the kick-starter to start it again, turned right and proceeded up Country Hills Drive. (T.86-87).

Officer Carpenter became suspicious, as he testified:

A. I observed the motorcycle. As I approached the intersection, it caught my eye immediately because there was no movement at all; nothing else moving. He appeared to me to lay the motorcycle down, and out of my own wondering, with the amount of destruction that we've had at the Dee Center, I wondered had he been involved with something at the Dee Center. Were his arms full of things that he was trying to ditch or something like that? Was something wrong

with his bike? Had it quit? I had no idea. It was 4:00 o'clock in the morning. I assumed that he was either having problems or he was hiding from me; one of the two. So I made the turn from Taylor eastbound on 4200, and as I made the turn, he brought the bike right back up and made a right-hand turn and proceeded eastbound across Skyline Drive. (T.10).

Mr. Carpenter testified that Appellant accelerated rapidly, based on the sound of the motorcycle, but didn't know what speed he was going. (T.11). Appellant stated that he accelerated to approximately 30 miles per hour. (T.87). Officer Carpenter turned on his overhead emergency lights when he reached the intersection where Appellant was originally stopped. (T.14).

In response to questions by the Deputy County Attorney, Mr. Carpenter testified:

Q. Do you recall how long you were on Taylor looking across at the other individual?

A. Not a great deal of time. Maybe, oh, gosh, I would think five seconds would be the very, very most, and I doubt if it was anywhere near that long. Long enough that I observed him and flashed through my mind had he been in the Dee Center? Was he involved with something there? Or was he just having problems? I had no idea.

Q. Describe for the Court and jury what your intentions were so far as going over there to this individual?

A. Initially when I made the turn, my intentions were to inquire of him who he was, what he was doing at this time of the morning. Or it I would have gotten close and realized that his motorcycle was stalled, I would have done what I could to

help him. Or give him transportation or take him home. Something of that nature, which we frequently do with the students on campus. (T.11-12).

Officer Carpenter could point to no facts which would link Appellant to the Dee Events Center other than the fact that it was located approximately two blocks away. He acted solely out of suspicion.

Q. Let me ask you this, Mr. Carpenter: On this evening prior to the time you saw Mr. Lyon, did anybody complain to you about a motorcycle and a motorcycle driver on the premises of the Dee Special Events Center?

A. No, sir.

Q. No complaints whatsoever?

A. No.

*

*

*

Q. Yes. So you'd been on duty some five hours. In the normal course of events, how many times would you have checked the Dee Special Events Center on an average in those five hours?

A. It varies. Maybe only once or twice. Maybe I'd have checked it five or six times.

Q. So at least once or twice you'd been over there.

A. Yes, sir.

Q. Hadn't observed any people around there, had you?

A. Yes, I'd run out people prior to that time, I believe.

Q. What time was that? I,m talking about this particular evening.

A. I honestly don't recall whether I'd run out anyone at all. It was a common occurrence to find people there and just ask them to leave.

Q. I see. You didn't find anybody there with a motorcycle that evening, did you?

A. No, sir.

Q. See any suspicious motorcycle tracks around the Dee Events Center that evening before you saw Mr. Lyon?

A. No, sir.

Q. Hear any motorcycles churning around in the dirt out there just before you saw Mr. Lyon?

A. No, sir.

Q. No reports from any other police officers or employees of the college I take it that there was anything annoying going on at the events center that evening?

A. No, sir.

Q. I guess after the fact you didn't find any damage done that night or motorcycle prints or anything like that after you checked it out later?

A. I never did get time to recheck it.

Q. Did anything come to your knowledge about anybody on a motorcycle doing any damage at the Dee Events Center.

A. No, sir.

Q. Nobody had broken in that night that you know of?

A. No, sir.

Q. No question is there then that when you initially observed Mr. Lyon on the motorcycle that that is not college property, is it?

A. No, sir, it is not.

Q. Where he turned up here on Country Hills Drive, that's not college property, is it?

A. No, sir.

Q. And where you originally put your lights on right up here about Beus' Pond and your siren and gave him a signal to stop, that's not college property either, is it?

A. No, sir.

Q. Well, you testified that when you saw the bike going down, you thought he might have something in his arms, is that correct?

A. I wondered, yes.

Q. Did you see anything in his arms?

A. No, sir, I did not.

Q. Pretty good sized motorcycle he was driving, wasn't it?

A. Yes.

Q. Probably weighs three, 400 pounds?

A. I would believe, yes.

Q. Kind of hard to drive that I guess holding something in his arms as you've demonstrated to the jury, wouldn't it?

A. He has a big gas tank on top of that. Be very easy to put materials on that.

Q. But did you see anything on top of the gas tank?

A. No, sir.

Q. Or if you saw anything on the gas tank, it probably would have fallen off, wouldn't it?

A. Yes, sir.

Q. Did you see anything that had fallen off at this intersection?

A. No, sir.

Q. Well, tell me this, Officer Carpenter, just what facts could you point to at the time you first observed Mr. Lyon on the motorcycle that he was in the process of committing a crime or that he had committed a crime? What facts did you have?

A. None.

Q. No facts whatsoever? Just suspicious?

A. Yes, sir.

Q. And I guess people do drive along this road, is that true?

A. I'm sure they do, yes.

Q. Isn't this a big housing development up in here?

A. Yes, sir.

Q. And I guess there are only two ways out of the housing development; come down 46th on Harrison or go over to Taylor and south, is that correct?

A. Yes, sir.

Q. And I guess there's not much traffic at 4:00 a.m., but you sometimes do see people driving around city streets at 4:00 a.m., is that correct?

A. Yes, sir.

Q. Motorcycles and cars both?

A. Yes.

Q. Sometimes motorcycles will kill and you have to use the kick starter and kick start them back into action, is that true.

A. Yes, sir.

Q. Sometimes you kick start a motorcycle and you jump down and then pull it back up and go, don't you? (Indicating)

A. Yes, sir.

Appellant failed to stop for the overhead lights and siren, was caught, and charged with evading a police officer.

ARGUMENT

POINT I

THE LOWER COURT SHOULD HAVE RULED AS A MATTER OF LAW THAT THE COLLEGE SECURITY OFFICER ACTED OUTSIDE OF HIS AUTHORITY IN ATTEMPTING TO STOP APPELLANT AND THE REFUSAL TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE WAS ERROR AND APPELLANT WAS ERRONEOUSLY CONVICTED.

At the conclusion of the State's case, Appellant moved to dismiss on the grounds that the prosecution had failed to prove that the College security officer was acting within the scope of his authority when he first attempted to stop Appellant. (T.51). The lower court denied the motion and submitted the issue to the jury. (T.55).

One of the elements of the offense, as set forth by the lower court in Instruction 5, was as follows:

4. That the signal to stop was in fact given by a peace officer acting within his legal authority. . . .

Appellant submits that the security officer was not acting within his legal authority at the time and place where he gave Appellant a signal to stop as is required for prosecution under §41-6-169.10, U.C.A., 1953.

The authority of college security officers is specifically set forth in §53-45-5, U.C.A., 1953, which provides in relevant part:

Members of the police or security department of any state institution of higher education . . . shall be peace officers and shall also have all of the powers possessed by policemen in cities . . . providing, however, that such powers may be exercised only in cities and counties in which such institution, its branches or properties are located and only in connection with acts occurring on the property of such institution or when required for the protection of its interests, property, students or employees. . . . (Emphasis Added).

This case is controlled by State In Interest of Hurley, 28 Utah 2d 248, 501 P.2d 111 (1972), wherein this Court construed the foregoing statute as it related to the activities of a security officer from the University of Utah. In Hurley, the officer was patrolling an alley located one-half block from the campus in an area where a fraternity and a religious institute for students was located and where students often parked their cars. He observed two juveniles who were apparently working on the engine of a car and he stopped to inquire whether they needed assistance. Upon receiving vague and suspicious answers to his questions the officer requested identification and a scuffle ensued. Hurley attempted to hinder the subjugation of his companion and was arrested and convicted of interfering with an officer.

The key issue in Hurley was whether the officer was acting within the scope of his official duty as a policeman. The Court had to determine whether the officer's patrol of the off-campus alley was within the purview of the phrase

"when required for the protection of its interests, property, students or employees." 501 P.2d at 113.

This Court held that the officer in Hurley was not acting within the scope of his official duty, stating:

There emerges from the statute a legislative intent to restrict the extra-territorial exercise of power of these institutional police, with one sole exception. The phraseology "when required for the protection" indicates some type of exigent circumstances which impels immediate response. The word "interests" is broad and all inclusive; however, when it is considered in association with the words "property, students, or employees" its general import appears appropriately restricted to these subjects. Thus, the legislature, in this exception, has granted power to these institutional police, beyond the property of the institution, only under some type of exigent circumstances, where the direct and immediate interests of the institution concerning its property, students, or employees is involved. Id.

It was noted that the only asserted "interests" of the University were the proximity of the alley, the nearness of a fraternity and religious institute and the fact that University students often parked in the alley. This Court ruled, "These interests were too remote and indirect to invoke the extraterritorial exception in Section 53-45-5, U.C.A., 1953." (Emphasis Added).

The rationale behind this Court's decision in Hurley is apparent. There is no need to have college security officers perform general police functions in the residential areas surrounding the college. This job is ably performed by city police and county sheriffs. The sole

reason for the existence of campus police is to protect those interests which were so narrowly circumscribed in Hurley. Obviously the Legislature did not intend to establish an independent police force with a general jurisdiction coterminous with that of the city in which the institution is located.

Similarly, in Courange v. State, 510 P.2d 961 (Ok. Crim. App. 1973), the Court of Criminal Appeals of Oklahoma held that a campus policeman had no authority to arrest a person for "driving under the influence" when the offense occurred on a public road and not on university property. The Oklahoma statute was akin to that of Utah and provided in relevant part as follows:

Any campus policeman . . . shall have all the powers vested by law in peace officers . . . in the protection and guarding of grounds, buildings, and equipment of the institution. . . . 510 P.2d at 962.

The clear meaning of the statute and cases cited is that a campus officer operating off college property does not possess the same power to investigate suspicious conduct, short of the actual commission of a crime, as would a police officer duly constituted to act in that jurisdiction. The campus officer must be able to point to some "exigent circumstances where the direct and immediate interests of the institution concerning its property, students, or employees is involved." 501 P.2d at 113. Any broader interpretation of the limitations of a campus policeman's authority would be

unconstitutionally vague. If the determination of what constituted the "interests" of the college were left to the whim and caprice of an individual officer, the statute would lack the degree of clarity required in Great Salt Lake Authority v. Island Ranching Co., 18 Utah 2d 276, 421 P.2d 504 (1966) (Eminent domain authority held unconstitutional for failure to clearly define its limits).

In the instant case the security officer was unable to point to any of the requisite exigent circumstances. He mentioned two acts of vandalism which occurred several weeks prior to Appellant's arrest but which were not connected in any way with Appellant. All he could point to were the hour of the night, the proximity of college property and the arguably suspicious action of tipping the motorcycle to one side then driving away. There was no evidence that, prior to the time the security officer turned on his overhead lights, that Appellant had committed any crime or traffice offense. Nothing tied Appellant to the College or its interests other than the fact that he was approximately two blocks from the Dee Events Center.

It should be noted in Hurley that the scene of the arrest was closer to unversity property that that in the instant case and the alley was used by students for parking. Moreover, the conduct of the juveniles was much more suspicious than that of Appellant. The juveniles were actually working on a vehicle, the ownership of which they could not

explain. Here, it is difficult to credit the security officer's impression that Appellant was attempting to hide from him by laying his motorcycle down in an open, well-lit intersection. The officer had no more than mere suspicions and decided to investigate further. He had no authority to use his emergency signals to order Appellant to stop.

It is well established that a public officer who acts beyond the limits of his authorized jurisdiction is treated as a private citizen. The rule is set forth in 5 Am.Jur.2d "Arrest" §50, (1962) as follows:

A public officer appointed as a conservator of the peace for a particular county or municipality as a general rule has no official power to apprehend offenders beyond the boundaries of the county or district for which he is appointed, unless statutes so provide.

Moreover, it is stated in Kilbreck and Porter, Law of Arrest and Seizure, 1st Ed. (1965), p.63:

Peace officers of limited authority are only peace officers when carrying out the duties of their respective employment. (Emphasis Added).

The law in Utah follows this general rule. In People v. Coughlin, 13 Utah 58, 44 Pac.94 (1896), this Court held that a constable could not arrest outside of his county in the capacity of a peace officer but could do so as a private citizen if the statutory requirements were met. See State In Interest of Hurley, supra.

Further, the Office of the Utah Attorney General has

issued an opinion which indicates that officers of limited authority, acting outside of their geographical or otherwise authorized limits, act only as private citizens. Opinion of the Utah Attorney General, 63-019, 1963 - 1964 Biennial, (March 11, 1963), p.136.

In the present case, when Mr. Carpenter acted he did so as a private person and not as a police officer within the meaning of §41-6-169.10, U.C.A., 1953. Since this statute does not recognize an offense of failure to stop for a private citizen or evading a private citizen, no crime has been established.

POINT II

THE LOWER COURT'S INSTRUCTION CONCERNING THE STANDARD TO BE APPLIED IN DETERMINING WHETHER THE OFFICER WAS ACTING WITHIN HIS AUTHORITY WAS ERROR.

The lower court instructed the jury, in part, as follows:

You are instructed that a peace officer of a college in Utah has authority to act on the college property. He also may act in the area surrounding the institution, but only when it would reasonably appear to a prudent person that such act was in fact reasonable for the protection of the interests, property, students or employees of the institution. Instruction No. 6. (Emphasis Added).

Appellant submits that the instruction constituted prejudicial error since it substituted a relaxed "reasonable man" standard for the strict standard set forth in the statute and holding of this Court.

The statute provides that a campus officer may act off-campus "only . . . when required for the protection of its interests, property, students or employees." §53-45-5, U.C.A., 1953. (Emphasis Added). There is a huge difference between whether an act is "reasonable" for their protection and when it is "required" for their protection.

Further, as noted in POINT I, this Court held in Hurley, supra:

Thus, the legislature, in this exception, has granted power to these institutional police, beyond the property of the institution, only under some type of exigent circumstances, where the direct and immediate interests of the institution concerning its property, students, or employees is involved. 501 P.2d at 113. (Emphasis Added).

The standard enunciated by this Court is far more strict than the "reasonable" standard contained in the jury instruction. It cannot be said that the jury did not apply the lesser standard in convicting Appellant and, thus, the instruction was prejudicial error.

POINT III

THE LOWER COURT'S INSTRUCTION REGARDING HOT PURSUIT THROUGH A PEACE OFFICER'S JURISDICTION WAS ERROR.

As part of Instruction No. 6 the lower court instructed the jury as follows:

If a peace officer acts outside his jurisdiction, he acts as an ordinary citizen and he has no powers beyond those of an ordinary citizen and a person who evades him would not

be evading a peace officer. However, if the person flees into or through the peace officer's jurisdiction, it might take on the character of a peace officer's activities and so continue as long as the peace officer is in "hot pursuit", that is directly attempting to capture or catch. (Emphasis Added).

Appellant submits that the quoted portion of the instruction was a misstatement of the applicable law and the jury could have relied on it to convict Appellant.

The testimony indicated that several blocks after the officer first attempted to stop Appellant, the city road on which they were travelling was, for a short distance, abutted on both sides by college property. (T.46). It is undisputed, however, that the attempt to stop Appellant and the subsequent pursuit began well outside of college property. (T.42).

The power of a peace officer to arrest a person in another jurisdiction in situations involving "fresh pursuit" is recognized in §77-13-36(1)(a), U.C.A., 1953. The term "fresh pursuit" is defined in §77-13-26, U.C.A., 1953, as follows:

The term, "fresh pursuit", as used in this act shall include fresh pursuit as defined by the common law and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay. (Emphasis Added).

The common law definition of "fresh pursuit" is set forth in 5 Am.Jur.2d "Arrest" §51 (1962), as follows:

Under the common-law doctrine of fresh pursuit, an officer may pursue a felon or a suspected felon, with or without warrant, into another jurisdiction and arrest him there. Similar powers are sometimes conferred by statute. The common-law doctrine, however, applies only to cases of felony. . . . (Emphasis Added).

The instruction was erroneous since the offense involved in the present case was at most a misdemeanor. More importantly, the doctrine of fresh pursuit necessarily implies that the officer was justified in beginning the pursuit in the first place. It is tortured logic to state that a pursuit which was commenced as a private citizen through the unlawful use of emergency signals, (See POINT IV), suddenly became the offense of evading a police officer and a fresh pursuit because the Appellant fortuitously travelled through college property. This approach ignores the fact that the officer's unjustified actions created the situation in the first place.

Clearly the doctrine of fresh pursuit is unapplicable in the instant case and the instruction constituted prejudicial error because the jury could have found Appellant guilty on the basis of the erroneous instruction even if it found that the security officer was unjustified in initially attempting to stop Appellant. The authority of the officer to stop Appellant must be determined at the point he first turned on the overhead lights. If he lacked authority initially, it may not be cured by the subsequent chain of events.

Further, the use of the word "might" in the instruction is too vague and leaves far too much latitude to the jury.

POINT IV

THE LOWER COURT'S INSTRUCTION CONCERNING THE POWER OF AN ORDINARY CITIZEN TO ARREST FOR A MISDEMEANOR WAS ERROR.

As part of Instruction No. 6 the lower court stated: "A private citizen may arrest for a misdemeanor immediately observed by the citizen." This is a correct statement of the law. §77-13-4, U.C.A., 1953. However, Appellant submits that this portion of the instruction was prejudicial error because it was not supported by the evidence and could have misled the jury.

Nowhere in the transcript is there any evidence that the security officer observed Appellant committing a misdemeanor prior to the time he turned on his overhead lights. (T.43,49)

Therefore, if he was acting as a private citizen, he had no authority to try to stop Appellant in the first place. Moreover, the use of emergency lights and signals by a private citizen is prohibited. §41-6-140, U.C.A., 1953.

Under the instruction as given, the jury could have been misled and convicted Appellant even if it found that the officer was acting as a private citizen. The prejudicial effect of this portion of the instruction would then be compounded by the "hot pursuit" instruction referred to in POINT III.

CONCLUSION

Appellant was improperly convicted. The facts in the case clearly show that Officer Carpenter was acting beyond his statutory authority and, therefore, only as a private citizen. There was no evasion of a police officer. The jury was improperly instructed concerning the standard to be applied to determine whether the officer exceeded his authority, the doctrine of fresh pursuit and the arrest powers of a private citizen. The conviction should be reversed.


Respectfully submitted this 10th day of March, 1978.

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CERTIFICATE OF MAILING

I hereby certify that on this 10 day of March, 1978, I mailed two copies of the foregoing Brief of Appellant, postage prepaid to Robert B. Hansen, Utah Attorney General, State Capitol Building, Salt Lake City, Utah 84114.


Tori H. Thurston, Secretary