

1978

State of Utah v. Kenneth J. Gandee : Appellants Petition For Rehearing and Supporting Brief

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. 15000 /

KENNETH J. GANDEE, /

Defendant and /
Appellant. /

APPELLANT'S PETITION FOR REHEARING AND

APPEAL FROM THE JUDGMENT OF THE
JUDICIAL DISTRICT COURT, IN AND FOR
COUNTY, STATE OF UTAH, THE HONORABLE
WAHLQUIST, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	/	
Plaintiff and	/	
Respondent,	/	
vs.	/	Case No. 15635
KENNETH J. GANDEE,	/	
Defendant and	/	
Appellant.	/	

APPELLANT'S PETITION FOR REHEARING AND SUPPORTING BRIEF

PETITION FOR REHEARING

The Defendant and Appellant, Kenneth J. Gandee, herein petitions this Honorable Court for a rehearing on the Judgment rendered by the Supreme Court on November 3, 1978, wherein this Honorable Court affirmed a Judgment of the Lower District Court, wherein the Appellant was judged guilty of the criminal offense of carrying a concealed weapon on the ground that:

The Court erred in holding Carrying a Loaded Firearm pursuant to U.C.A., 76-10-503, is not a lesser included offense of carrying a Concealed Dangerous Weapon pursuant to U.C.A., 76-10-504.

STATEMENT OF THE KIND OF CASE

The Defendant-Appellant appeals from the Judgment of

conviction entered upon a jury verdict on the 9th day of June, 1976, in the District Court of Weber County, in and for the Second Judicial District, State of Utah, the Honorable John F. Wahlquist, Judge, presiding, for the offense of carrying a concealed weapon contrary to Utah Code Annotated, Section 76-10-504, as amended, on the 29th day of September, 1975.

DISPOSITION IN LOWER COURT

The above entitled matter came on regularly for jury trial on the 9th day of June, 1976, before the District Court, Weber County, State of Utah, the Honorable John F. Wahlquist, Judge, presiding, following which the jury returned its verdict of guilty to the charge of carrying a concealed weapon. From the Judgment of guilty, the Defendant appealed to the Utah Supreme Court.

RELIEF SOUGHT ON REHEARING

Appellant seeks reversal of Appellant's conviction in the Lower Court and remanding same to the Lower Court for a new trial and seeks to have the Supreme Court reconsider the decision rendered on November 3, 1978, wherein the Court denied Appellant's Petition for Reversal of the decision of the Lower Court.

STATEMENT OF FACTS

The facts are stated in the original Brief to which reference is hereby made. However, perhaps a brief resume at this point

for the convenience of the Court should be made. On or about September 29, 1975, Officer Corey Bott, a South Ogden City Police Officer heard four gun shots in rapid succession and observed the Appellant walking out of the driveway and get into his truck. That after Officer Bott brought the Appellant vehicle to a stop, the officer testified that when he asked the Appellant where the gun was, that the Appellant lifted his shirt and pulled the gun forward with his hand on the butt of the gun. The officer further testified that he could not honestly testify whether the gun was in the Appellant's pants or on the seat next to the Appellant.

The testimony of the Appellant and the Appellant's ex-wife was that as the Appellant left the South Ogden residence, he was holding the gun in his hand and the Appellant further testified that he placed the gun in the seat next to him in his truck.

That after the testimony was presented, a conference was held in chambers where Appellant's then counsel indicated to the Court that he would request a lesser included instruction, and the Court indicated such offense was not a lesser included offense and indicated that the Court would submit to the jury two separate charges, the Third Degree Felony as charged and also the Class B Misdemeanor that the Appellant had requested as a lesser included offense instruction, wherein Appellant's

counsel then indicated he was not going to submit the Appellant to a double offense (TR-121). Thereafter, the Court indicated that it could not conceive of carrying a loaded firearm as being a lesser included offense of carrying a concealed weapon. (TR-122)

That thereafter, Counsel for Appellant made certain exceptions to the proposed jury instruction concerning the aspect of concealment (TR-126) and made no further exceptions (TR-127) to the giving of the lesser included instructions.

ARGUMENT

POINT I

THAT CARRYING A LOADED FIREARM IS A LESSER INCLUDED OFFENSE OF CARRYING A CONCEALED DANGEROUS WEAPON.

That U.C.A., 76-10-504, Carrying a Concealed Dangerous Weapon provides in essence, that any individual carrying a concealed dangerous weapon is guilty of a Class B Misdemeanor with an exception to such classification being that where the concealed weapon is a firearm or sawed off shotgun, such offense is then a Third Degree Felony.

Therefore, U.C.A., 76-10-504, is a Third Degree Felony only when the dangerous weapon involved is a firearm or sawed off shotgun.

The statute thus provides that where the concealed dangerous

weapon is a knife, bomb, brass knuckles, or any other device, an individual prosecuted pursuant to U.C.A., 76-10-604, can be charged only with a Class B Misdemeanor.

It is respectfully submitted that in properly construing the manner in which the Appellant was charged in the instant case pursuant to U.C.A., 76-10-504, the proper application of said statute is that the Appellant is alleged to have committed the offense of concealing a loaded firearm or sawed off shotgun, a Third Degree Felony. That under any other construction of 76-10-504, the Appellant could only be charged with a Class B Misdemeanor and not with a Third Degree Felony as has been adjudicated in the instant case.

That this Honorable Court in its decision of November 3, 1978, indicates that:

Under Section 504, a person could be charged with carrying a "concealed weapon" which might be a knife, bomb, or explosive device, but if the proof of the element of concealment failed, he would not be guilty of the violation of Section 505 because it would not be a "loaded firearm" as prohibited in that Section.

It is respectfully submitted to this Honorable Court, that where the Appellant is alleged to have committed the offense of carrying a concealed weapon, to-wit: a knife, bomb, or explosive device, the Appellant would only be subjected to a Class B Misdemeanor and there would be no necessity or rational basis upon which to submit a lesser included offense to the

Trier of Fact.

However, when the "Concealed Weapon" is a firearm and as such being a Third Degree Felony, as in the instant case, it is respectfully submitted that carrying a loaded firearm pursuant to U.C.A., 76-10-505, is in fact a lesser included offense and should have been submitted to the jury.

That in State v. Close, 499 P.2d 287, 288 (1972), the Utah Supreme Court reversed the Defendant's conviction for indecent assault where the Trial Court refused Defendant's proposed instruction after the lesser included offense of simple assault. In State v. Close, the jury was instructed that the Defendant must be guilty of indecent assault or not guilty. This Court held in reversing:

Under the circumstances shown, we believe that the interest of justice requires that the jury should be informed of a lesser and included offense and be given the opportunity to consider it as one of the possible verdicts.

Similarly, in People v. Burns, 200 P.2d 134 (1948), the California Supreme Court held that the Court should instruct the jury on every material question upon which any evidence deserving of any consideration whatever exists, and the fact that such evidence may not be of such a character to inspire belief does not authorize the refusal of an instruction thereon. The Court further held, that the character of the evidence in question is within the exclusive providence of the jury, and however incredible the testimony may be, the Defendant

is entitled to an instruction on his theory of the evidence adduced.

This Honorable Court in State v. Dougherty, 550 P.2d 175, indicated that the request for a lesser included instruction may be refused if the prosecution has met its burden of proof on the greater offense and there is no evidence which would tend to reduce the greater offense.

The Court further stated:

The Court concluded by stating that if there be any evidence, however slight, on any reasonable theory of the case under which the Defendant might be convicted of a lesser included offense, the Court must, if requested, give an appropriate instruction.

It is respectfully submitted that the Appellant testified that the weapon was on the seat, not concealed under his clothing (TR-72), and Appellant's ex-wife testified that as Appellant left her residence to go to his truck, that the Appellant was holding the gun in his hand (TR-108,-109). The arresting officer further testified he did not honestly know if the gun was on his person or the car seat. (TR-48,-49)

It is respectfully submitted that the Appellant had raised the issue of concealment by virtue of such testimony as a lesser included offense and such instruction should have been submitted to the jury.

POINT II

THE APPELLANT GAVE THE COURT AND ADVERSE PARTY NOTICE AND OPPORTUNITY TO CONSIDER APPELLANT'S REQUEST FOR A LESSER INCLUDED OFFENSE AND THIS COURT SHOULD REVIEW THE FAILURE TO GIVE SUCH REQUESTED INSTRUCTION, EVEN THOUGH NO FURTHER SPECIFIC EXCEPTION WAS MADE.

That Rule 51 of the Utah Rules of Civil Procedure in its pertinent application provide:

No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the Appellant Court, in its discretion and in the interest of justice, may review the giving or failure to give an instruction.

That Appellant's counsel made a request that the lesser included instruction be given (TR-121), and that the Court responded to such request as follows:

MR. JONES: Okay, I wouldn't mind having it in there if both sides agree to it.

THE COURT: How are you going to classify it as a lesser included offense?

MR. JONES: I guess we can't.

THE COURT: How can we possibly do that? You can charge it as a second offense. That is the only way it would be known. Otherwise one doesn't include it as the other at all. He could be guilty of both or guilty of neither.

MR. GALE: Well, I am not going to submit him to a double offense.

THE COURT: I mean, possibly he never got in the car, he could have the one offense, or you could have had the gun in the car and never on his person at any time.

MR. GALE: Well, the only way you could put it in, you could find the Defendant innocent or guilty of the Class B and guilty of the Third Degree.

THE COURT: In analysis, how can the jury do such a thing? They might return both.

MR. GALE: Well, I don't think they can do that.

THE COURT: I don't think you could punish him for both, certainly. I cannot conceive of it as a lesser included offense. (TR-121,-122)

It is respectfully submitted that Appellant's counsel raised the issue of the giving of a lesser included offense instruction in the Lower Court, and that the Court and parties had notice and the opportunity to consider Appellant's request.

That this Court in State v. Valdez, 432 P.2d 53 (1967), held that "the purpose of exception is to assist the Court in giving correct instructions. This purpose is best served by calling its attention to what is wrong or suggesting what is right".

The Valdez case is clearly distinguishable, in that counsel deliberately and intentionally elected not to request the lesser included offense, while in the instant case, counsel for Appellant did request the Court to instruct the jury on a lesser included offense, and the Court clearly indicated that the Court could not conceive of the requested instruction as being a lesser included offense.

It is, therefore, respectfully submitted that the Court having had the opportunity to consider the request did in fact, make a ruling on the request for the lesser included offense.

instruction, and Appellant's counsel's failure to specifically except to the failure of the Court to give such an instruction under such circumstances is tantamount to an exception. Further the situation is such that this Court should in its discretion and in the interest of justice review the failure to give such instruction pursuant to Rule 51 of the Utah Rules of Civil Procedure.

Similarly, State v. Close, cited supra, provides that in the absence of an appropriate instruction, the Court should instruct on the lesser included offense when the interest of justice so require it.

It is respectfully submitted that the interest of justice do so require in the instant case, in that the included offense instruction was discussed in chambers with ample opportunity for the Court to determine whether or not that such instruction would be given and the issue of lesser included offense is not being raised for the first time in the Supreme Court.

It is further submitted to this Honorable Court, that under the unique facts of this case, such fact mandate the application of the Supreme Court in the interest of justice to review the failure of the Lower Court to give a lesser include instruction.

CONCLUSION

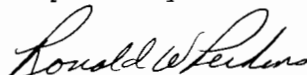
The offense of Carrying a Loaded Firearm pursuant to U.C.A., 76-10-505, should be held to be a lesser included offense

of Carrying a Concealed Dangerous Weapon pursuant to U.C.A.,
76-10-504.

That this Court in rehearing and reconsidering the instant case should in the interest of justice find that the failure of the Lower Court to give the lesser included instruction deprived the Appellant of the opportunity, that the Trier of Fact would find said Appellant guilty of the lesser included offense, and that, accordingly, the Defendant-Appellant's Judgment of conviction should be set aside and remanded for a new trial with proper instruction.

DATED this 16 day of November, 1978.

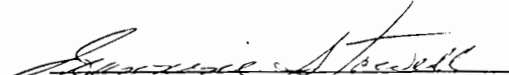
Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the foregoing Supporting Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorneys for Respondent, Robert B. Hansen, Attorney General, Michael L. Deamer, Deputy Attorney General, and Craig L. Barlow, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, on this 16 day of November, 1978.


Jeannine Stowell, Secretary

THE ATTORNEY GENERAL



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FILED

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Clerk, Supreme Court, Utah

July 17, 1978

Honorable A. H. Ellett
Chief Justice
Utah State Supreme Court
Salt Lake City, Utah 84114

Re: State of Utah v. Gilbert Lopez,
Utah Supreme Court No. 15636

Dear Chief Justice Ellett:

The appellant's attorney in the above entitled case, in harmony with Anders v. California, 386 U.S. 738, 87 S.Ct. 1296, 18 L.Ed.2d 493 (1967), stated that it is his opinion that the issues raised on appeal are not sound and has requested that he be allowed to withdraw.

This office feels that it would be futile to respond to a brief of this nature when likely the only assistance we could lend the Court would be to repeat the statements of the appellant's attorney.

We feel that this would lend no beneficial impact to the Court, but we are willing to respond to any particular issues or do additional research at the Court's direction if requested.

We would appreciate it if you would accept this letter as a formal response in lieu of filing a brief and either proceed to dismiss the appeal on its merits or in harmony with Anders v. California. If the Court is desirous of having additional input from our office in any particular, we would be happy to comply upon direction.

Very truly yours,

William W. Barrett
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WVB/sh

cc: Sheldon R. Carter, Esq.

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