

1978

State of Utah v. Kenneth J. Gandee : 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. 15000

KENNETH J. GANDEE,

Defendant and
Appellant.

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County
Honorable John F. Wahlquist,

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Ogden, Utah

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FILED

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Clerk, Supreme Court

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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.

BRIEF OF APPELLANT

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 the 9th day of June, 1976, before the District Court

of Weber County, in and for the Second Judicial District, 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 appeals.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction in Lower Court and remanding same to the Lower Court for a new trial.

STATEMENT OF FACTS

That on or about September 29, 1975, one, Corey Bott, a South Ogden City Police Officer was dispatched to 5415 South 700 East, for a minor family disturbance in the area. (R-21) That as Officer Bott was approaching such address, said individual heard what he believed to be four gunshots in rapid succession. (R-22)

That at that time, the officer observed the Appellant walking out the driveway, open his truck door and get into his truck. (R-24)

Officer Bott then testified that he turned the spotlight of his vehicle on the Defendant's rearview mirror and the Defendant thereafter started his truck and pulled away from the curb with the officer following after said vehicle. (R-24-25)

That Officer Bott continued his attempts to have the

Appellant bring his vehicle to a stop, which was finally accomplished by said officer. (R-27)

That Officer Bott then testified that he approached the vehicle in which the Appellant was seated from the rear along the left side of the vehicle, and that the Defendant had to turn to look at said officer. (R-28)

At this time, Officer Bott indicated that he asked the Appellant where the gun was and that the Appellant at that time lifted his shirt and pulled the gun forward with his hand on the butt of the gun. (R-28)

That upon cross-examination by Appellant's counsel, Officer Bott testified that while he did not see a gun in the Appellant's hand as he was leaving the residence in South Ogden, that that does not mean he did not have a gun in his hand. (R-41)

That Officer Bott further indicated that when he approached the Appellant's vehicle, that it was dark in the interior of the truck. (R-45)

Further, Officer Bott testified that he did not see the weapon in the pants of the Appellant by reason of the position in which the Appellant was sitting in the truck. (R-48)

That Officer Bott further testified as follows:

Q. All right. I will ask you now, do you know whether that gun came from his pants or the seat right beside him?

- A. I couldn't see the barrel inside his pants, no.
- Q. All right. So you honestly don't know whether it was on his person or on the seat?
- A. From the position I was sitting in, it looked like it was on his person.
- Q. But you can't say that for sure?
- A. Swear up and down, no, because I could not see the barrel inside his pants.
- Q. And you don't know, honestly, whether it was in his pants or it was on the seat?
- A. I don't think I can answer that question fairly, one way or the other.
- Q. All right. Because you don't know one way or the other?
- A. Okay.
- Q. And, even if it was in his pants, you don't know whether it was concealed or not?
- A. It was concealed at the time or why would he have lifted his shirt to take it out, and that is when the weapon became visible. (R-48-49)

That Officer Bott further testified that if he had come around to the other window of Appellant's vehicle, that even if the weapon had been in the Appellant's belt, that the Officer didn't know whether the shirt would have been sticking up over the weapon or not.

Officer Bott further indicated to the Court, that he couldn't honestly tell the Court that it was concealed. (R-50)

That the Appellant testified that when he left the South

Ogden residence, that he was carrying the gun in his hand.
(R-66,70)

That Janene Gandee, the ex-wife of the Appellant, testified that when the Appellant left her residence to go to his truck, that the Appellant was holding the gun in his hand, and further, that she was sure that he had the weapon in his hand. (R-108-109]

The Appellant further testified that when Officer Bott came up to the window of the vehicle, that the Appellant picked up the gun from the seat beside him and that the gun was not hidden or covered on his body any where. (R-72)

That the Appellant requested that the Court submit to the jury a "lesser included" instruction. The Court indicated that it would give such an instruction if the State and Defendant would agree to such instruction and that the offense could be classified as a lesser included offense. That the State indicated that such classification could not be made. (R-121)

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY AS TO THE DEFENDANT'S REQUEST FOR A LESSER INCLUDED INSTRUCTION.

The Trial Court in Jury Instruction No. 6 instructed the jury in the above matter as follows:

Before you can convict the Defendant of the crime of carrying a concealed weapon, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

1. On or about September 29, 1975, in Weber County, the Defendant had in his possession a firearm, to-wit: a .22 calibre pistol.

2. It was a dangerous weapon.

3. That he concealed said weapon intentionally by hiding the gun under his shirt or in his belt.

If you believe that the evidence establishes each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the Defendant. On the other hand, if the evidence has failed to so establish one or more of said elements, then you should find the Defendant not guilty.

Under Utah Code Annotated, Section 77-33-6, 1953, as amended, the jury may find a criminal Defendant guilty of any offense which is necessarily included within the offense charged.

But in the instant case, the Defendant requested the Court to submit a lesser included instruction to the jury classifying the offense as a misdemeanor, carrying a loaded firearm.

The Utah Supreme Court in State v. Bell, 563 P.2d 186 (1977), held that a request by the Defendant to charge the jury on lesser included offenses should have been made in writing. However, the Utah Supreme Court has the power, in the interest of justice and in exercise of its discretion, to review the giving or failure to give such needed instruction in the absence

of such instruction having been presented to the Court in writing.

Further, the Utah Supreme Court in State v. Bell, cited supra, held:

The Trial Court should give the instructions for lesser included offenses whenever, by any reasonable view of the evidence, the Defendant would be guilty of the lesser included offense. The instructions for included offenses may properly be refused if the prosecution has met its burden of proof on the greater offense and there is no evidence tending to reduce the greater offense.

The Utah Supreme Court in State v. Dougherty, 550 P.2d 175 (1976), held in considering the propriety of the Lower Court in refusing to grant a lesser included instruction, that such an instruction may properly be refused when the the prosecution has met its burden of proof as to the greater offense and there is no evidence intending to reduce the greater offense.

The Utah Supreme Court in State v. Gillian, 463 P.2d 811 (1970), held that it is a fundamental principle, that upon the request of the parties, they are entitled to have instructions given upon their theory of the case when there is any substantial evidence to justify such instruction. The Court further in Gillian indicated that where a question raised relates to the refusal of the Court to give a lesser included offense instruction, the usual rule after viewing of the record in the light most favorable to the jury's verdict does not apply. Where such refusal is a question on appeal, the duty of the Court is to

survey the whole evidence and inferences drawable therefrom to see if there is any reasonable basis upon which the Defendant could be convicted of the lesser offense.

It is respectfully submitted in the instant case, that the jury, upon proper instruction pursuant to Utah Code Annotated, 76-10-505, could have rendered a conviction for the lesser offense of carrying a loaded firearm in his vehicle or upon a street, in that evidence was presented that the weapon while possessed by the Appellant was not concealed by the Appellant.

In the instant case, the jury was instructed as to the elements of carrying a concealed weapon, a third degree felony, in Instruction 6, and such elements in essence provided that the Defendant had a firearm in his possession, that it was a dangerous weapon, and that said Defendant concealed said weapon intentionally by hiding the gun under his shirt or in his belt, and that it made no difference whether the hiding occurred while leaving a dwelling, entering a truck, or during an arrest sequence.

That the distinguishing feature between Utah Code Annotated 76-10-504, and Utah Code Annotated, 76-10-505, is the act of concealment. Further, the element of possessing a firearm and such having been established by the evidence and testimony of Officer Bott to have been loaded at the time (R-32, 33),

the weapon is deemed to be loaded pursuant to Utah Code Annotated, 76-10-502, and such weapon being loaded constitutes a "dangerous weapon" pursuant to U.C.A., 76-10-501.

That the requisite element of Carrying a Loaded Firearm in a Vehicle or on a Street was presented to the jury and such elements are included within the greater offense of Carrying a Concealed Dangerous Weapon which differ only in that the weapon must be concealed.

That in applying the principle announced in State v. Gillian, State v. Dougherty, and State v. Bell, cited supra, it is respectfully submitted that there is a reasonable basis upon which the Appellant could have been convicted of the lesser offense had such instruction been given.

POINT II

EVIDENCE PRESENTED BY THE STATE IN THE LOWER COURT IS INSUFFICIENT FOR FINDING OF GUILTY BY THE JURY.

That the Utah Supreme Court in State v. Mills, 530 P.2d 1272 (1975), held that it is the prerogative of the Trier of Fact to weigh the evidence, the credibility of the witnesses, and the facts found therefrom. The Court further stated, that where a Defendant is challenging the sufficiency of the evidence, all inferences are reasonably drawn and, therefore, must be drawn in a manner most favorable to the jury.

It was stated in State v. McClanahan, 510 P.2d 153 (1973), wherein the Kansas Supreme Court held and stated the well recognized rule, that each necessary element of the crime must be proven and established beyond a reasonable doubt, and that it is a jury's duty to apply the rules of law as announced by the Court to the evidence even though such application is in the face of public outcry and indignation.

The Kansas Supreme Court further in State v. McClanahan, cited supra, extensively quoted Mr. Justice Storey's decision in the United States v. Battiste, 2 Sum. 240, 244, 24 Fed. Cas. [No. 14,545], p. 1042 at p. 1043, wherein Mr. Justice Storey stated:

My opinion is, that the jury are no more judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in every civil case, tried upon the general issue. In each of these cases, their verdict, when general, is necessarily compounded of law and of fact; and includes both. In each they must necessarily determine the law, as well as the fact. In each, they have the physical power to disregard the law, as laid down to them by the Court. But I deny, that, in any case, civil or criminal, they have the moral right to decide the law according to their own notions, or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law; as it is laid down by the Court. This is the right of every citizen; and it is his only protection. *** Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.

The California Court in People v. Silver, 197 P.2d 90 (1948), held that in cases involving circumstantial evidence, in order to justify a conviction, the facts should be proved where it must not only be entirely consistent with the guilt of the Defendant, but must also be found to be inconsistent with any other rational conclusion.

That in the instant case, the testimony of Officer Bott that said officer could not determine if any gun was in the Appellant's hand or belt, and if it was in his belt, that whether the shirt was sticking up over the gun or not, and that Officer Bott couldn't honestly tell the jury that the weapon was concealed. (R-50)

That such testimony of the location and concealment of gun by the Appellant in light of Officer Bott's testimony is thus based on circumstantial evidence, and such being circumstantial evidence in light of People v. Silver, cited supra, a finding of guilt in case of circumstantial evidence can be rendered only when there is no evidence adduced that is not entirely consistent with the guilt of the Defendant and is inconsistent with any other rational conclusion.

That while it is fundamentally the exclusive province of the jury to pass upon the evidence as to the facts in issue, such jury is bound in making a determination of innocence or guilt upon the instructions as given by the Court and are so

bound by the Court's instructions.

However, when the testimony of the State's sole eyewitness is such that said witness could not honestly tell whether the gun was concealed under the shirt of the Appellant, the State has failed to prove every element of the offense alleged to have been committed by the Appellant beyond a reasonable doubt, and that said verdict of guilty is not supported by the evidence.

Further, when an instruction as to a lesser included offense is requested and not given to a jury, the jury's discretion in reaching a determination is thereby unduly restricted to the detriment to the Appellant herein.

CONCLUSION

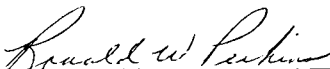
The Trial Court's refusal to give the jury the Defendant's request for a lesser included instruction invaded the exclusive province of the jury. Clearly, the jury in the instant case was not given the proper opportunity to consider or convict the Appellant on a lesser charge of carrying a loaded firearm and such refusal to so instruct was in deprivation of the Appellant's right.

That the jury's verdict of guilt is further not supported by the law to which the jury was instructed, and accordingly, the Defendant-Appellant's Judgment of conviction should be

set aside and same remanded for a new trial with proper instructions.

DATED this 19 day of July, 1978.

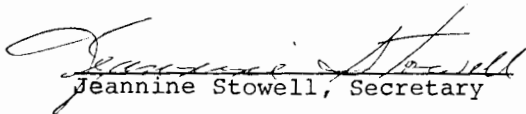
Respectfully submitted,

A handwritten signature in cursive script, reading "Ronald W. Perkins", written over a horizontal line.

RONALD W. PERKINS
Attorney for Appellant

CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Robert B. Hansen, Attorney General for the State of Utah, State Capitol Building, Salt Lake City, Utah 84114, on this 19 day of July, 1978.


Jeannine Stowell, Secretary