

1979

## State of Utah v. Johnny Frank Sosa : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No. 15000

JOHNNY FRANK SOSA, :

Defendant-Appellant. :

-----  
BRIEF OF RESPONDENT  
-----

APPEAL FROM THE SECOND JUDICIAL  
DISTRICT IN AND FOR DAVIS COUNTY  
THE HONORABLE J. DUFFY PALMER  
PRESIDING.  
-----

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FILED

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15929
JOHNNY FRANK SOSA,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Possession of a Dangerous  
Weapon by a Convicted Person, a violation of Utah Code Ann.  
§ 76-10-503, 1953 as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried in the Second Judicial District  
Court for Weber County, before the Honorable Judge Duffy  
Palmer, without a jury. He was found guilty of a third  
degree felony as charged on September 22, 1977. Judge  
Palmer sentenced appellant to 0 - 5 years in the Utah State  
Prison on June 15, 1978.

## RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of appellant's conviction.

## STATEMENT OF THE FACTS

On the Fourth day of June, 1977, appellant drove a van up in front of a group of people on 25th Street in Ogden and fired at them with a rifle (R. at 43,44).

Shortly thereafter, three police officers from the Ogden City Police Department stopped a van matching the description of the truck driven by appellant (R. 15 48). The police were positive that it was appellant who exited from the driver's side when the truck came to a stop (R. at 48,49). A .22 rifle without a stock but in operable condition with a live round in the firing chamber was found under the front seat and a second, unloaded .22 rifle was found between the seats (R. at 51,53).

On the 6th day of June, 1977, a complaint was issued in Ogden City Court against appellant for carrying a loaded gun in a vehicle and for possession of marijuana. On July 5, 1977, appellant was found guilty of both charges in that court (R. at 40).

On June 7, 1977, appellant was charged with possession of a firearm by a convicted person (R. at 1). Appellant was tried and convicted of this charge on September 22, 1977 (R. at 63). Appellant was subsequently sentenced to serve 0 - 5 years at the Utah State Prison on June 15, 1977 (R. at 66).

#### ARGUMENT

##### POINT I.

SINCE THE TWO OFFENSES COMMITTED BY APPELLANT WERE PROPERLY PROSECUTED IN SEPARATE COURTS, THE TWO PROSECUTIONS WERE NOT MUTUALLY EXCLUSIVE UNDER UTAH CODE ANN. § 76-1-402(2), 1953 AS AMENDED.

Appellant contends that the present prosecution of a third degree felony, initiated in district court, should have been precluded under Utah Code Ann. § 76-1-403(1)a, 1953 as amended, by his previous conviction of carrying a loaded firearm in a vehicle, a class B misdemeanor, in Ogden City Court.

Utah Code Ann. § 76-1-403(1)a, 1953 as amended, states:

"If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent

prosecution for the same or a different offense is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under § 76-1-402(2) in the former prosecution."  
(Emphasis added)

Utah Code Ann. § 76-1-402(2) provides that:

"Whenever conduct may establish offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant should not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court."

Appellant contends that under the Utah Constitution the district court had technical jurisdiction of both the third degree felony and the Class B misdemeanor. The Utah Constitution, Article VIII § 7 provides:

"The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same . . . ."

Nevertheless, it is clear that the district court does not have original jurisdiction of both offenses. This



identical question was raised recently in State v. Cooley, Utah, 575 P.2d 693 (1978). In that case, the defendant committed three offenses within the same course of conduct. Two of the offenses were Class B misdemeanors and the third was an indictable misdemeanor, triable only in district court. This court cited Hakki v. Faux, 16 U.2d 132, 396 P.2d 867 (1964) which held that the jurisdiction of a district court over a misdemeanor triable in justice's and city court, (Class B and C misdemeanors; see Utah Code Ann. § 78-4-16, 1953 as amended prior to the "Circuit Court Act of 1977" and § 78-5-4(1)(a)) could only be invoked by appeal or where it appears by the certificate that there is no justice of the peace in the county qualified to try the case. (Id. at 868) See also State v. Telford, 93 Utah 228, 72 P.2d 626: 627 (1937). In Cooley, supra, this court went on to note that:

"Article VIII, Section 7 of the Utah Constitution provides:

The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; . . . (Emphasis in original).

The legislature did provide by law the following:

All public offenses triable in the district courts, except cases appealed from justices'

and city courts, must be  
prosecuted by information  
or indictment. . .  
(Utah Code Ann., 1953,  
77-16-1)

It thus is evident that the provisions of U.C.A., 1953, 76-1-402 (2)(a) relating to a single criminal episode does not apply for the reason that the crime of failing to stop a vehicle at the command of a police officer cannot be tried in the same court where the other two crimes must be tried."

As in Cooley, the offenses in the instant case were only triable in separate courts. Although the district court had appellate jurisdiction over the misdemeanor charge, it is clear that it had no original jurisdiction and that the offense could not have been prosecuted in that court. This is consistent with State v. Johnson, 100 Utah 316, 114 P.2d 1034 (1941) wherein the court distinguished original or independent jurisdiction and appellate jurisdiction and then noted:

"Original jurisdiction as used in the constitutional provision means an independent jurisdiction, one not based upon or limited to review of another court's judgment or proceedings." (Id. at 1038)

The court then stated:

"We determine then that the constitutional provision does not mean that regardless of statutory

rules, practice, and procedure, any civil or criminal matter, not expressly prohibited by law, may be commenced in the District Court. There being no constitutional inhibitions, the legislature may define and prescribe the forum in which actions may or must be commenced, and the procedure necessary to pass from one court to another." (Id. at 1039)

Finally, the court held that:

"It appears therefore that the proper venue for the commencement of an action for a non-indictable misdemeanor has been laid in the justice's court or the city court, While the District Court has general jurisdiction in all criminal matters, the proper procedure in misdemeanor cases as prescribed by statute is to commence the action in the city or justice's court. That is the form, process, and procedure prescribed by statute for bringing into operation by appeal the action of the district court in such cases." (Id. at 1042)

In the instant case, the jurisdiction of the district court with respect to appellant's class B misdemeanor offense was appellate only. Ogden City Court had no jurisdiction whatsoever of the felony charge and the district court had original jurisdiction. The two offenses were not within the jurisdiction of a single court and, therefore, could not have been tried together. The obvious intent of Utah Code Ann. § 76-1-403 is to bar multiple prosecutions

when those actions could have been joined. To hold that prosecutions of separate offenses arising from the same course of conduct are mutually exclusive even when joinder is not possible would frustrate the intent and purpose of the legislature in creating and providing for punishment of the separate offenses. Moreover, such a holding would leave the state in the undesirable position of having to choose to prosecute only some of the offenses committed by a defendant. Clearly such a result could, as in the instant case, frustrate sound public policy and circumvent the demands of justice. The law as laid down by this court in Cooley, supra, that non-joinable prosecutions are not mutually exclusive should be upheld and this conviction affirmed.

#### POINT II.

APPELLANT'S CONVICTION IS PROPER  
SINCE THE DOUBLE JEOPARDY DOCTRINE  
DOES NOT BAR A SUBSEQUENT PRO-  
SECUTION OF A SEPARATE NON-  
INCLUDED OFFENSE.

Article I, Section 12 of the Utah Constitution  
provides:

" . . . nor should any person be  
twice put in jeopardy for the same  
offense."

This Court held in State v. Harris, 30 Utah 2d, 354, 517 P.2d  
1313 (1974) that:

"It is basic that the twice in jeopardy rule protects against subsequent prosecution only for the same offense." (Id. at 1314).

It was also noted, in State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945) that:

"A prosecution is for the entire offense and not for the separate elements thereof. If a prosecution is barred, it bars the entire action and not merely the use of certain elements thereof. So our question is, whether as a whole the acts charged in the two actions are the same. If they are, then the second prosecution is barred. If they are not, then the action is not barred even though some of the acts proved in the first prosecution are also elements of the second." (Id. at 262).

The United States Supreme Court follows essentially the same rule. In Brown v. Ohio, 432 U.S. 161 (1977), the court declared that:

"The established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment was stated in Blockburger v. United States, 284 U.S. 299, 304 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932):

'The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine

whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . . ."

This test emphasizes the elements of the two crimes. 'If each requires proof that the other does not, the Blockburger test would be satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . . .'" (citations omitted)

"If two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." (Id. at 166)

In the instant case, the elements of the offenses charged in separate prosecutions differ. Either offense could have been established without establishing the other.

Appellant's first conviction was for carrying a loaded firearm in a vehicle in violation of Utah Code Ann. § 76-10-505:

"Every person who carries a loaded firearm in a vehicle or on any public street in an incorporated city or in a prohibited area of an unincorporated territory within this state is guilty of a class B misdemeanor." (Emphasis added) (See also Utah Code Ann. § 23-20-21 1953 as amended, which proscribes the same conduct and, insofar as is pertinent to this problem, requires proof of essentially the same elements).

A conviction under this statute would require that any person carried a loaded firearm in a vehicle within the stated areas.

Appellant's second conviction, which is the subject of this appeal, was for possession of a dangerous weapon by a convicted person in violation of Utah Code Ann. § 76-10-503, 1953 as amended:

"Any person who is not a citizen of the United States, or any person who has been convicted of any crime of violence under the laws of the United States, the state of Utah, or any other state, government, or country, or who is addicted to the use of any narcotic drug, or any person who has been declared mentally incompetent shall not own or have in his possession or under his custody or control any dangerous weapon as defined in this part. Any person who violates this section is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun he shall be guilty of a felony of the third degree.

Under this statute, a prosecution would have to show that the defendant was one of the types of persons prohibited from possessing weapons but not that the firearm was loaded. In short, the state could have established the necessary elements for conviction in either prosecution without establishing the elements required in the other

prosecution. In accordance with Harris, Thatcher, and Brown, all supra, the doctrine of double or former jeopardy does not apply. See also State v. Gandee, Utah, case No. 15635, filed November 3, 1978.

Appellant cites Waller v. Florida, 397 U.S. 387 (1970), to indicate that the two offenses need not be identical for double jeopardy to apply. However, the issue in that case concerned the concept of "dual sovereignty". The court specifically noted that:

"We act on the statement of the District Court of Appeal that the second trial on the felony charge by information 'was based on the same acts of the appellant as were involved in the violation of the two city ordinances' and on the assumption that the ordinance violations were included offenses of the felony charge.

Whether in fact and law petitioner committed separate offenses which could support separate charges was not decided by the Florida courts, nor do we reach that question. What is before us is the asserted power of the two courts within one state to place petitioner on trial for the same alleged crime." (Id. at 390).

It was assumed in Waller that the two offenses were identical. The case cannot be taken to establish that two offenses need not be identical to support a double jeopardy claim.

In Brown v. Ohio, supra, also relied upon by appellant, the court noted the Blockburger test cited above and then held that:



"Applying the Blockburger test, we agree with the Ohio Court of Appeals that joyriding and auto theft, as defined by the court, constitute 'the same statutory offense' within the meaning of the Double Jeopardy Clause. App. 23. For it is clearly not the case that 'each statute requires proof of an additional fact which the other does not.' 284 U.S. at 304, 52 S.Ct., at 182. As is invariably true of a greater and lesser included offense, the lesser offense - joyriding - requires no proof beyond that which is required for conviction of the greater - auto theft. The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." (Id. at 168)

As has already been noted in the instant case, different elements had to be proven in each of the prosecutions, neither established the other. Double jeopardy does not apply and the trial court was correct in ruling that the felony prosecution was not barred by the prior misdemeanor conviction in city court.

#### CONCLUSION

Although appellant was convicted in Ogden City Court of a misdemeanor arising out of the same course of conduct which gave rise to the instant felony prosecution, this action is not barred by Utah Code Ann. § 76-1-403, 1953 as amended, because the actions could not have originated in the same court.

The doctrine of double jeopardy does not apply because the establishment of each offense requires proof of different elements: neither is subsumed within the other.

For these reasons, appellant's conviction of a third degree felony in district court was proper and should be affirmed.

Respectfully submitted

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