1988

State of Utah v. Greg Doty : Brief of Appellant

Utah Court of Appeals

Scott M. Burns; attorney for plaintiff- respondent.
James L. Shumate; attorney for defendant - appellant.

880657-CA

DOCKET NO. _____ IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Respondent, vs. GREG DOTY, Defendant-Appellant.	)	Case No. 880657-CA Category No. 2

BRIEF OF APPELLANT

Appeal from a conviction of a Class B Misdemeanor of Providing Alcohol to a Minor, and an Order Staying the Imposition of Sentence and Ordering Probation from the Fifth Circuit Court for Iron County, State of Utah, the Honorable Robert T. Braithwaite, Circuit Judge, presiding.

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JURSIDICTION OF THE COURT OF APPEALS

The jurisdiction of the Utah Court of Appeals is established by 78-2a-3 (2)(d), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of Providing Alcohol to a Minor, a Class B Misdemeanor.

ISSUES PRESENTED ON APPEAL

The issue in this appeal is whether or not the Defendant was denied due process of law when, at the close of the State's evidence, the Information was amended from charging Contributing to the Delinquency of a Minor to charging Providing Alcohol to a Minor, and whether or not the matter must be dismissed with prejudice.

DETERMINATIVE STATUTE

The statute believed to be determinative in this case is 77-35-4(d), Utah Code Annotated, 1953, as amended. The text appears as follows:

> (d) The Court may permit an Indictment or Information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the Defendant are not prejudiced. After verdict, an Indictment or Information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

NATURE OF THE CASE

This is an appeal from a conviction of Providing Alcohol to a Minor, a Class B Misdemeanor. The decision in the case will turn on the procedural aspects of the amendment of the Information after the State had rested and the Defense had moved to dismiss the information on the basis that the state had failed to make a prima facie case.

COURSE OF THE PROCEEDINGS

The Defendant was tried before the Fifth Circuit Court for Iron County, Cedar City Department, the Honorable Robert T. Braithwaite, presiding, in a non-jury trial, on June 30, 1988. The Defendant was charged in an Information alleging Contributing to the Delinquency of a Minor on June 15, 1988. The State's evidence showed that both of the minors involved, Jared Larson and Scott David Bonzo, were over the age of 18 years on

June 15, 1988. (Mr. Larson's date of birth was November 7, 1969, T. 13, and Mr. Bonzo's date of birth was March 22, 1970, T. 27.) The Circuit Court granted the State's Motion to amend the Information to allege violation of 32a-12-8, Utah Code Annotated, 1953, as amended, substituting Providing Alcohol to Minors for the original charge of Contributing to the Delinquency of a Minor under 78-3a-19, Utah Code Annotated, 1953, as amended.

DISPOSITION AT TRIAL COURT

The Defendant was found guilty of Providing Alcohol to Minors and was ordered to be placed on probation for a six month period of time and required to pay a fine in the sum of $160.00.

STATEMENT OF FACTS

The Defendant was arrested on June 15, 1988, and charged with Contributing to the Delinquency of a Minor. At the time of the trial of this matter the State presented evidence showing that the two persons allegedly receiving the alcohol from the Defendant were over the age of 18 years. (T. 13, and 27) At the close of the State's evidence, the defense counsel the moved the Court for dismissal for failure to make a prima facie case on the charge of Contributing to the Delinquency of a Minor. (T. 38, 39) The Court stated that the State would be allowed to amend the Information charging a violation of 32a-12-8, Utah Code Annotated, 1953, as amended. (T. 40) That amendment was made over the strenuous objection of defense counsel. (T. 40) The

Court, however, reduced the charging offense from a Class A Misdemeanor which is the level of offense provided for a violation of 32a-12-8, Utah Code Annotated, 1953, as amended, to a Class B Misdemeanor which is the level of offense provided for a violation of 78-3a-19, Utah Code Annotated, 1953, as amended. (T. 41 and 42) The record is clear that the defense requested the Court to dismiss the Information and discharge the Defendant and did not request a continuance as offered by the State and the Court. (T. 43)

The facts under which the Defendant was charged were that on the night of June 15, 1988, he was driving a vehicle in which the two persons under the age of 21 years of age, Jared Larson and Scott Bonzo, were riding. There was beer in the car which was placed in the car by the Defendant, and the two persons under the age of 21 years, Larson and Bonzo, consumed that beer within the presence of the Defendant.

SUMMARY OF ARGUMENT

It is the Defendant-Appellant's contention that the State, having rested their case, cannot then amend the Information to charge a totally different offense, which, under the statute, carries a different penalty, and which, under the statute, contains substanially different elements than the original offense. The Defendant-Appellant also contends that jeopardy has now attached and that the conviction should be reversed and remanded with instructions to the trial court to

dismiss the Information and refund the fine paid by the Defendant.

ARGUMENT

POINT I

THE TRIAL COURT COMMITTED AN ERROR IN ALLOWING THE AMENDMENT OF THE INFORMATION TO CHARGE A DIFFERENT OFFENSE THAN CONTRIBUTING TO THE DELIQUENCY OF A MINOR.

The Defendant's right to due process under Article I, Section 12 of the Utah State Constitution, and the 14th Amendment of the United States Constitution, allows the Defendant an inherent right to be informed of the charge against him and to prepare for defense against that charge. The original Information in this case charges two counts of Contributing to the Delinquency of a Minor, alleging that on June 15, 1988, the Defendant did provide a child with an alcoholic beverage. The Defendant, in preparing for the defense of this matter, reviewed the police reports and noted on the police reports that on June 15, 1988, both of the individuals receiving the alcoholic beverage were over the age of 18 years. It seemed clear to the Defendant's counsel that the matter should proceed to trial and that a Motion for Dismissal should be granted at the close of the State's case if they insisted on going to trial with the Contributing to the Delinquency of a Minor charge. That is exactly what happened. Under the provisions of 77-35-18(o), the Court should have issued an Order dismissing the Information

upon the ground that the evidence was not legally sufficient to establish the offense charged. This statute, of course, appears to be discretionary with the Court, but it is the Defendant's contention that the Court abused its discretion by not dismissing the Information and allowing the State to radically amend the Information and then requiring the Defendant to be placed on his proof and to present a defense. The statute allowing the amendment of the Information at any time before the verdict is conditional, allowing amendment so long as no additional or different offense is charged and the substantial rights of the Defendant are not prejudiced. (77-35-4(d), Utah Code Annotated, 1953, as amended.) In this instance, the substantial rights were prejudiced and a different offense was charged in the amendment. The matter should have been dismissed at the close of the State's case.

This Court has recently construed 77-35-4(d), Utah Code Annotated, 1953, as amended, in the case of State v. Jamison, 99 Utah Adv. Rep. 32, January 9, 1989, and favorably reviewed the standards set in McNair v. Hayward, 666 P.2d 321 (Utah, 1983). The holding in those two cases is that the statute in question requires that the Defendant have adequate notice in order to prepare a defense, and that the crime be sufficiently specified so that the Defendant cannot be prosecuted a second time for the same charge. This Defendant had no time to prepare for the amendment to the Information in the case and specifically requested that the Information be dismissed.

The Utah Supreme Court in the case of State v. Lancaster, 94 Utah Adv. Rep. 29, November 4, 1988, has also recently construed this statute. However, the facts in Langcaster vary substantially since the amendment to the Information was made well in advance of the trial. The statute was also addressed by this Court in State v. Ramon, 736 P.2d 1059 (Utah Ct. App., 1987). The Ramon case, in dealing with the difference between theft by receiving and concealing stolen property found that an amendment on the day of trial was in error.

POINT II

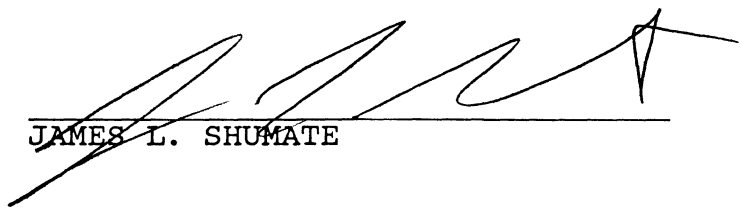
JEOPARDY HAS ATTACHED AND THE DEFENDANT SHOULD BE DISCHARGED.

The provisions of 76-1-402 (1), Utah Code Annotated, 1953, as amended, and Article I, Section 12 of the Utah State Constitution, as well as the 5th Amendment of the United States Constitution, all provide that the Defendant may not be twice prosecuted for offenses which may have arisen out of a single criminal episode. 76-1-402 (1) provides specifically "an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision." For this reason, the Defendant's conviction should be reversed and the Circuit Court ordered to dismiss the matter and the Defendant should be discharged.

CONCLUSION

The Defendant-Appellant specifically requests that this Court reverse the judgment of the Circuit Court and remand the matter to the Circuit Court with instruction to dismiss the Information with prejudice and on the merits, therefore barring any further prosecution of the Defendant.

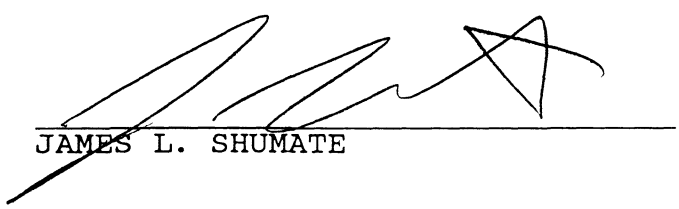
DATED this 21st day of January, 1989.



JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Scott M. Burns, Iron County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 21st day of January, 1989, first class postage fully prepaid.



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