

1979

Logan City v. Robert Kelly Bassett : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOGAN CITY,)
Plaintiff-Respondent,)
vs.)
ROBERT KELLY BASSETT,)
Defendant-Appellant.)

BRIEF OF RESPONSE

APPEAL FROM A JUDGMENT OF THE HONORABLE
FIRST JUDICIAL DISTRICT COURT IN AND FOR

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FILED

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IN THE SUPREME COURT OF THE
STATE OF UTAH

LOGAN CITY,)	
Plaintiff-Respondent,)	
vs.)	Case No.
		16320
ROBERT KELLY BASSETT,)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

Defendant in a criminal misdemeanor case appealed from a judgment by the Honorable Zachary T. Champlin, Circuit Court Judge, as affirmed by the Honorable VeNoy Christoffersen, District Court Judge.

DISPOSITION IN LOWER COURT

The District Court denied Defendant's appeal from the Circuit Court's denial of Defendant's motion to dismiss a charge filed by the City of Logan concerning driving with a blood alcohol content of .10% or higher.

RELIEF SOUGHT ON APPEAL

Respondent requests that this Court affirm the District Court's decision and dismiss appellant's appeal.

STATEMENT OF FACTS

Respondent agrees with Appellant's Statement of Facts and for the convenience of the Court, restates them herein:

By a single Complaint signed January 30, 1978, the appellant was charged with having committed criminal offenses on January 25, 1978 of driving with a blood-alcohol content of .10% or higher, driving a motor vehicle through a red stop light, and being a person under the age of twenty-one years in possession of alcoholic beverages.

The matters were set for trial on April 12, 1978. At the start of the trial Count 2 and 3, the red light violation and illegal possession of alcohol violation respectively, were dismissed on motion of Logan City. Then the prospective jurors were sworn and voir dired. A jury was selected and sworn to try the case.

Appellant's counsel then moved the Court to dismiss Count 1, the charge of driving with a blood alcohol content of .10% or higher, pursuant to 76-1-402 and 403, Utah Code Annotated. This motion was granted by the Logan City Judge, the Honorable Zachary T. Champlin.

On April 17, 1978, Logan City appealed Judge Champlin's decision to the District Court of the First Judicial District in and for the County of Cache, contending that the City Court erroneously interpreted and applied the Single Criminal Episode Statutes, 76-1-402 and 403, Utah Code Annotated.

The appellant filed a Motion to dismiss respondent's appeal, contending that the Notice of Appeal had

not personally been served upon the appellant or his counsel. This Motion was denied by Memorandum Decision of Judge VeNoy Christoffersen on June 16, 1978.

Appellant then filed a Motion to dismiss the Complaint pursuant to the Single Criminal Episode Statutes.

By Memorandum Decision dated August 21, 1978, Judge VeNoy Christoffersen denied appellant's Motion to dismiss the appeal.

Immediately after this Memorandum Decision, appellant filed a Motion to dismiss the Complaint, contending that 77-51-6, Utah Code Annotated, constituted a bar to any further prosecution of the appellant.

By Memorandum Decision dated September 19, 1978, Judge Christoffersen declined to rule on that issue and remanded the matter back to Logan City Court which had by this time become the Logan Department of the Circuit Court.

Appellant then filed his Motion to dismiss the Complaint in the Logan Department of the Circuit Court. It was denied by the Honorable Zachary T. Champlin by Memorandum Decision dated November 20, 1978.

Appellant filed an appeal to the Cache County District Court, still contending that 77-51-6, Utah Code Annotated, prohibited further prosecution of the offense of driving with a blood-alcohol content of .10% or higher. By Memorandum Decision dated February 8, 1979, the Honorable VeNoy Christoffersen denied appellant's motions and appeal.

ARGUMENT

DISMISSAL OF A CRIMINAL CASE ON MOTION OF DEFENDANT WHICH WAS RESISTED BY THE CITY AND WHICH DISMISSAL WAS FOUND TO BE ERRONEOUS ON APPEAL BY THE CITY, IS NOT A DISMISSAL PURSUANT TO TITLE 77, CHAPTER 51 OF THE UTAH CODE.

On April 12, 1978, Plaintiff was ready to try Defendant on three charges:

1. Driving a motor vehicle through a red stop light.
2. Being a person under age of twenty-one years in possession of alcoholic beverages.
3. Driving with a blood alcohol content of .10% or higher.

In the presence of Defendant and his attorney, Plaintiff City moved to dismiss Counts 1 and 2 mentioned above with no objection from the Defendant (obviously). The Court then proceeded to impanel and swear in a jury to try Defendant on the remaining charge. Defendant's lawyer slyly waited until that had been accomplished and then moved the Court to dismiss the remaining count because it had suddenly become a "subsequent prosecution" arising out of the same criminal episode which, he argued, was now barred by Sections 76-1-402 and 76-1-403, U.C.A., 1953. The trial court accepted the argument, granted defense counsel's motion and dismissed the case. The City immediately appealed which resulted in a reversal of the trial court, and after considerable other legal maneuvering, Defense counsel then argued that the case had been dismissed pursuant to Chapter 51 of Title 77, Section 4, which provided:

The court may, either of its own motion or upon the application of the county attorney,

in furtherance of justice order an action,
information or indictment to be dismissed.
The reasons for the dismissal must be set forth
in an order entered upon the minutes. (Emphasis
added.)

The Court is invited to examine all of the sections in
Chapter 51. It will find that the only dismissals allowed
by or provided for in the chapter are:

1. Dismissals on the court's own motion in furtherance
of justice.
2. Dismissals on the motion of the county attorney
in furtherance of justice.

Section 77-51-6, U.C.A., 1953, provides that if the Court
dismisses on its or the county attorney's motion in furtherance
of justice, the Defendant cannot again be prosecuted
for that offense. With that the City agrees. But as the
District Court stated it,

"...this was not a dismissal as provided by the
cited chapter. The dismissal was based entirely
upon another section of the code in which this Court
on the first appeal termed to be was erroneous.
Therefor the dismissal is not a bar to further
proceedings by the circuit court."

In Boyer v. Larsen, 433 P.2d 1015 (Ut. 1967), cited
by Defendant the court dismissed the case, but it is not
entirely clear who made the motion. Apparently the motion
was made by the prosecuting attorney because in dealing
with the issues the court cited a case where the county
attorney had made the motion. Therefore Defendant cannot
cite it as authority for a circumstance where Defendant
made the motion. The real issue addressed by the court

in that case was whether the Defendant had been in jeopardy because the dismissal took place before a jury was impaneled. The focus was not on whether Defendant or the prosecution made the motion or whether Defendant could waive double jeopardy protection by his own motion.

Defendant also cites State v. Lewis, 536 P.2d 738, (Id. 1975), but points out the very reason why the case does not aid him but rather supports the Logan City view. The statute on which the Idaho court relied specifically includes motions made by Defense counsel. Utah's statute excludes those motions.

A PARTY WHO PROCURES OR CAUSES OR CONSENTS TO AN ERRONEOUS DISMISSAL OF A CHARGE AGAINST HIM, CANNOT CLAIM DOUBLE JEOPARDY.

Defendant must take responsibility for the error of the trial court when it dismissed the charge against him upon his motion and urging. See State v. Shaw, 6 Ariz. App. 33, 429 P.2d 667 (1967), where a mistrial was mistakenly or erroneously granted upon Defendant's own motion. See also State v. Madrid, 113 Ariz. 290, 552 P.2d 451 (1976), People v. Hathcock, 504 P.2d 476, 106 Cal. Reporter 540, 8 Cal., 3rd 599 (1973), and United States v. Tateo, 377 U.S. 463, 467, 12 L. Ed. 2d 448, 451, 84 S. Ct. 1587 (1964).

Jeopardy under the circumstances of this case has continued through the appeal process and still remains until that process ends. Boyer v. Larson, supra.

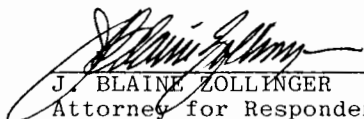
Criminal procedural law is designed to set forth a procedure which is orderly and fair to the litigants before the court. However, because defendants everywhere have continually resorted to it in an attempt to avoid a trial based on the merits, and with considerable success, the need of the people of a state or city to be treated with procedural fairness when attempting to enforce their laws and ordinances, sometimes gains little attention. It is hoped that in reviewing this matter the Court will recognize that need as being very real.

CONCLUSION

It affords no comfort and makes little sense to tell a city it has a right to bring violators to justice and to prosecute for offenses committed, but if a trial court commits error at the urging of the Defendant and the City corrects that error by a successful appeal, it nevertheless cannot bring the violator to face the charge even though the City committed no error and did everything it could to prevent it. Such a result can hardly be said to be procedurally fair to a city and the people it represents.

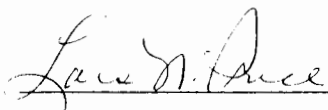
The right to appeal under those circumstances is hardly a right at all. Plaintiff urges the Court to affirm the District Court's decision.

Respectfully submitted,


J. BLAINE ZOLLINGER
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent, postage prepaid, to Brian R. Florence, Attorney for Appellant, 818-26th Street, Ogden, Utah, 84401, and two copies to Robert B. Hansen, Utah State Attorney General, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 7 day of May, 1979.


Lawrence N. Price