1979

City of Payson v. Richard C. Provstgaard : Appellant's Brief

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CITY OF PAYSON,)

Plaintiff and Respondent,)

vs.) Case No. 7165

RICHARD C. PROVSTGAARD,)

Defendant and Appellant.)

APPELLANT'S BRIEF

Appeal from Judgment of the Fourth District Court in and for
Utah County, State of Utah
The Honorable J. Robert Bullock, Judge

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APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

The defendant was charged by the City of Payson for driving under the influence of an intoxicating liquor.

DISPOSITION IN LOWER COURT

The matter was tried to a law trained judge in the Justice of the Peace Court. From a judgment of guilty, the defendant obtained a trial de nova to the District Court. The District Court, in a trial by jury, found the defendant guilty of driving under the influence of intoxicating liquor.

RELIEF SOUGHT ON AN APPEAL

Plaintiff seeks for reversal of the conviction by reason of the fact that the trial court gave the jury erroneous

instructions, and that as a matter of law there was insufficient evidence of the defendant's being under the influence of an intoxicating liquor to submit that question to the jury.

STATEMENT OF FACTS

The parties have stipulated to the following facts:

"On or about the 15th day of September, 1978, the defendant was stopped in Payson City for a speeding violation, but was subsequenty charged with driving under the influence of an 'intoxicating liquor'. The defendant admits that prior to the time of his being stopped that he had consumed approximately a six-pack of Utah 'light beer', which by weight consisted of 3.2% or less of alcohol, as the same is defined by statute. Defendant submitted to a breath test which indicated that he had a .10 'blood alcohol' content.

"A narrow and singular issue is to be presented [back] [sic] to the Court on appeal, namely, is the consumption of light beer, as defined by the statutes of this state, to be considered an 'intoxicating liquor' for the purposes of Title 41-6-44(a)."

At the conclusion of the city's case, defendant moved for a dismissal of the charge on the grounds that the city had not proven that defendant was under the influence of any intoxicating liquor, but the court denied the same.

ARGUMENT

POINT I

DEFENDANT WAS ENTITLED TO A DIRECTED VERDICT AS A MATTER OF LAW.

As indicated by the stipulated facts, the only evidence the City introduced at the trial was that the defendant had consumed some light beer. Plaintiff acknowledges that light beer is an alcoholic beverage, and that the 1977 Legislature made it an offense for a person to operate a motor vehicle under the influence of an alcoholic beverage, (see 41-6-44.5, U.C.A., 1953 as amended). However, previously the parent Statute of 41-6-44.5, only made it an offense to drive under the influence of an intoxicating liquor. For reasons of its own, Payson City chose to prosecute defendant for operating a motor vehicle under the influence of an "intoxicating liquor" rather than under the influence of an "alcoholic beverage". Thus, the question of defendant being under the influence of an alcoholic beverage is not and was not before the court. The city chose to charge the defendant with being under the influence of a "liquor", and that is what the city had to prove.

There is only one section in the Utah Code that defines what the words "liquor," "light beer," "alcoholic beverage," etc. means. Those definitions are set forth in 32-1-3, U.C.A., 1953 as amended, as follows:

> "Alcoholic beverage" means and includes "beer" and liquor as they are defined herein.
>
> "Light Beer" means beer containing not more than

3.2 per centum of alcohol by weight.

> "Liquor" means and includes alcohol or any alcoholic spirituous. . . drinks or drinkable liquids . . .; except that the term "liquor" shall not include light beer. (Emphasis added).

It is thus clear that it was and still is the legislative intent to exlude "light beer" from the term "liquor". Perhaps that is the reason why in 1977, the legislature chose to substitute the term "alcohol" for the term "intoxicating liquor" throughout the entire "drunk driving" Statute (41-6-44, U.C.A.). That is a further indication that the legislature recognizes the difference between the legislatively limited scope of the term "intoxicating liquor" and the broader legislative interpretation of the term "alcohol".

The charge against the defendant is a statutory criminal offense. By choosing to charge the defendant with being under the influence of an intoxicating liquor, the city was obligated to prove beyond a reasonable doubt that the defendant was in fact under the influence of an intoxicating liquor and not merely under the influence of an alcoholic beverage. When the city was unable to prove the consumption or use by defendant of any intoxicating liquor, as defined by Statute, the city had not met its burden and defendant was entitled to a directed verdict, as to the offense charged. By stipulation it is agreed that defendant had only consumed "light beer" as the same is defined by the legislature. Since light beer is not a "liquor", by statutory definition, and since the city chose to charge the defendant with the offense of being under the influence of "liquor", as opposed to being under the influence of alcohol, the

trial court should have either directed a verdict of acquittal, or, it should have specifically instructed the jury that in making its determination as to whether or not the defendant was under the influence of an intoxicating liquor, that they could not consider any consumption of light beer by the defendant.

POINT II

AN UNAMBIGUOUS STATUTE SHOULD NOT BE CONSTRUED OR REDEFINED SO AS TO STATE A CRIME.

Payson City chose the statutory language it wished to enforce against the defendant, i.e., that the defendant was under the influence of an intoxicating liquor. The city simply could not prove the same. Defendant acknowledges that there are statutory provisions that the defendant might have been charged under, namely, driving under the influence of "an alcoholic beverage", (41-6-44.5), and that the defendant's consumption of the light beer in the amount stipulated to would have been sufficient evidence for the court to submit to the jury the question of determining if the defendant was under the influence of an alcoholic beverage. However, inasmuch as the unambiguous statute must be construed to mean what the legislature says it does, the trial court erred in not instructing the jury to either exclude evidence of the consumption of the light beer, or in ordering that the jury return a verdict of acquittal. The fact remains that the legislature chose to exlude "light beer" from the term of liquor (See U.C.A. 32-1-3). There is no ambiguity in that statute. The 1977 legislature apparently recognized the

anonymity of the legislated restrictive term "intoxicating liquor when it changed the drunk driving statute by substituting "alcohol" for "intoxicating liquor". Payson City apparently did not recognize the difficulty and continued to use the "old" or former statutory language. The city having chose to enforce the state "drunk driving" statute is bound by the definitions pronounced or made by the legislative body that formulated the statute, including what liquor is or is not. The position of the city herein is somewhat similar to that of the State of Utah in State v. Archuletta, 526 P.2d 911, where this court held:

> There is nothing ambiguous about the Statute in the instant matter, it simply does not state a crime, and we are not empowered to state one for the legislators simply because it seems certain that they intended to state one themselves.

In Payson City v. Provstgaard, the city had a choice of pursuing the defendant under Section 41-6-44(a), which made it illegal for a person to drive on a public highway under the influence of an alcoholic beverage, or under Section 41-6-44.5 which made it illegal for a person to drive or in actual physical control of any vehicle with a blood alcohol content of .10% or greater. Notwithstanding those statutory provisions, the city chose to prosecute defendant for being under the influence of liquor. The city thus had a burden of proof to establish the consumation by defendant of more than an alcoholic beverages, i.e., the consumption of liquor, and the City simply could not, and did not meet that burden.

SUMMARY

The appellant contends: inasmuch as it is agreed by stipulation and by Statutory definition that the defendant was not under the influence of an intoxicating "liquor"; and, because of the need not to construe an unambiguous statute to mean something different than what it expressly provides, that the conviction by the jury in the trial court, should be ordered reversed, and the matter remanded to the trial court to enter a judgment of acquittal.

DATED this 15th day of October, 1979.

George E. Mangan

George E. Mangan
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing APPELLANT'S BRIEF, postage prepaid, to Dave McMullin, P.O. Box 176, Payson, UT 84651, on this 15th day of October, 1979.

Secretary