1979

State of Utah v. Jacob J. Lamorie : Brief of Respondent

Utah Supreme Court

Paul W. Mortensen; Attorney for Appellant;
Robert B. Hansen; Craig L. Barlow; Attorneys for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 16574

JACOB J. LAMORIE, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT, IN AND FOR GRAND COUNTY, STATE OF UTAH, THE HONORABLE BOYD BUNNELL, JUDGE, PRESIDING

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

PAUL W. MORTENSEN

50 East Center Street
P.O. Box 339
Moab, Utah 84532

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

PAGE

CASES CITED

TABLE OF CONTENTS
(Continued)

PAGE

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - - - -

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 16534
JACOB J. LAMORIE,	:	
Defendant-Appellant.	:	

- - - - - - - - - - - - - - - - - -

BRIEF OF RESPONDENT

- - - - - - - - - - - - - - - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellant was tried and convicted of possession of a dangerous weapon while on parole for a felony, a second-degree felony, in violation of Utah Code Ann., § 76-10-503(2) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in the Seventh Judicial District Court, in and for Grand County, State of Utah, the Honorable Boyd Bunnell, presiding. Appellant was found guilty on January 23, 1979, of the offense charged and was sentenced to serve 1 to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the lower court.

STATEMENT OF THE FACTS

On October 14, 1978, Jessee Powell, an off-duty trooper for the Utah Highway Patrol, stopped his truck at the scene of an automobile accident to assist anyone possibly injured (T. 17). Mr. Powell administered first aid to the appellant who had been a passenger in the vehicle that had crashed. Mr. Powell also prevented the appellant from leaving the scene in another passerby's car because of his belief that the appellant was intoxicated (T. 18).

Shortly thereafter, Charles Durrant, a twelve-year old boy who was with Mr. Powell, observed that the appellant was holding what appeared to be a sawed-off shotgun (T. 36, 43, 50). Mr. Powell never actually saw the appellant with the shotgun. However, he did see the appellant run down into an old wash in a crunched over position. The appellant was joined in the wash by Mr. Lowery, the driver of the vehicle that had crashed (T. 20, 25).

Trooper David Bailey of the Utah Highway Patrol arrived at the scene and went with Mr. Powell down into the wash where they were met by the appellant and Mr. Lowery (T. 20). The appellant had a metal scabbard in his hand (T. 52). Mr. Lowery was then arrested for driving

under the influence of alcohol and the appellant was arrested for public intoxication. Both were transported by Trooper Bailey to Green River, Utah (T. 52, 53).

After the arrest, Mr. Powell and the two boys who were with him, searched the wash and found the sword to the scabbard, a sawed-off shotgun and a shotgun shell (T. 22).

The appellant denied owning the gun and claimed to have never seen it before (T. 60). The appellant was charged with possession of a dangerous weapon while on parole for a felony. On January 23, 1979, the appellant was tried by a jury in the Seventh Judicial District Court in and for Grand County. To prove that the appellant was on parole for a felony, the State relied upon the testimony of Joseph L. Waters, a parole agent from Colorado and State's exhibit one: the Parole Agreement and the Judgment and Conviction Sentence and Mittimus of the appellant. The trial court ruled, over the objection of the defense attorney, that this evidence was not hearsay (T. 8, 14). The state did not prove that the sawed-off shotgun in the possession of the appellant was capable of operation. The appellant was convicted of possession of a dangerous weapon while on parole for a felony and sentenced to serve 1 to 15 years at the Utah State Prison.

ARGUMENT

POINT I.

A.

THE TRIAL COURT DID NOT ERR BY ADMITTING THE EVIDENCE OFFERED BY THE STATE TO PROVE THAT THE APPELLANT WAS ON PAROLE AFTER BEING CONVICTED OF A FELONY.

The appellant contends that the testimony of Mr. Waters, a Colorado parole agent, and State's Exhibit 1, the appellant's parole agreements and Judgement of Conviction Sentence and Mittimus, were improperly admitted into evidence at trial because of Rule 63 of the Utah Rules of Evidence, "Hearsay Evidence Excluded, - Exceptions." The appellant attempts to interpret the possible exceptions to the hearsay rule to make them inapplicable to the present case. Subsection 13 of Rule 63 reads as follows:

> (13). Business Entries and the Like. Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness;

The appellant contends that this exception does not permit State's Exhibit 1 to be entered as evidence because it was prepared by a deputy clerk of the Second Judicial Court of Colorado, and not by an employee of the Colorado Division

of Parole (see appellant's brief page 8-9). Such an interpretation is too narrow because it ignores the spirit of the hearsay exceptions and the case law regarding the admissibility of hearsay evidence. The correct intent of subsection 13 of Rule 63 is to allow the trial judge to admit the record if he is satisfied that the preparation and keeping of the records is, "such as to indicate their trustworthiness." In the present case, this criteria was met and the judge determined that the evidence was trustworthy. All four documents contained in state's exhibit 1 were properly notarized as true and correct copies (T. 8-15). Furthermore, the trial judge questioned Mr. Waters as follows:

> THE COURT: Mr. Waters, these documents are kept--of which these are certified copies, are kept in the usual course of your duties? They're within your office; are they?
>
> THE WITNESS: Yes, sir. They're kept under lock and key.
>
> THE COURT: These are actual copies of the documents that you have there and that you use in the course of your supervision of the various people that come under your control; is that correct?
>
> THE WITNESS. Yes. That's correct.
>
> MR. BENCE: I'll renew my request, you Honor. May Exhibit 1 be received?
>
> THE COURT: Yes. Exhibit 1 will be received in evidence.
>
> MR. MORTENSEN: I have to object to that strenuously, your Honor.

> THE COURT: You have objected. I'm overruling it. It clearly comes under an exception to the Hearsay Rule that it's kept in the usual course of business and under supervision. The testimony was it was under his supervision and control and had been for a number of years and the Court has the right to let him know why he had it under his supervision, and that these are the documents out of his file and that justifies that situation.

(T. 14).

The trial judge was satisfied that the records in State's Exhibit 1 were genuine records kept in the regular course of business and that they were trustworthy and thus he properly received them into evidence.

Case law substantiates the proposition that the criteria of trustworthiness is at the heart of the hearsay exceptions. The Utah Supreme Court in State v. Sibert, 310 P.2d 388, 6 Utah 2d 198 (Utah, 1957), said in reference to hearsay, "Such testimony is not admissible on the grounds that it lacks trustworthiness." (310 P.2d at 390). In United States v. Holland, 378 F. Supp 144 (1974), the Court said, "We believe that the focus of the hearsay rule and its exceptions is the trustworthiness, the reliability of the out of court declaration." (378 F. Supp. at 158). See also: Oltman v. Miller, 407 F.2d 376 (7th Circuit, 1969); Pope v. United States, 296 F. Supp. 17 (D.C. Cal. 1968); Sabation v. Curtiss National Bank of Miami Springs, 415 F.2d 632 (C.A. Fla. 1969).

Respondent submits that because the emphasis of the hearsay exceptions goes to the reliability of the testimony or record, the appellant's overly narrow construction of subsection 13 of Rule 65 has no merit. The trial judge determined that Mr. Waters' testimony and State's Exhibit 1 were reliable, and he therefore acted properly in allowing this evidence to come into court.

B.

THE TRIAL COURT IS ACCORDED A LARGE MEASURE OF DISCRETION IN DETERMINING MATTERS OF EVIDENCE AND SHOULD ONLY BE REVERSED IF THIS DISCRETION IS ABUSED.

It is a well-established rule that the trial court has wide discretion in allowing evidence to be received into court and unless there is a clear abuse of discretion, the appellate court will not overrule the trial court's decision. In reference to alleged hearsay records of evidence, the Washington Supreme Court said, "In this State, the ruling of the trial judge in admitting or excluding such records is given much weight and will not be reversed unless there has been a manifest abuse of discretion. Cantrill v. American Mail Line, 257 P.2d 179, 42 Wash. 2d 590 (Wash. 1953)." This rule is followed in most all appellate courts. See: Short v. Dawns, 537 P.2d 754, 36 Colo. App. 109 (Colo. 1975); State v. Cooper, 504 P.2d 978, 161 Mont. 85, (Mont. 1972); Butler v. Wong, 573 P.2d 86, 117 Ariz. 395 (Ariz. 1977).

The Utah Supreme Court has held that it will not overrule the trial court unless there is a clear abuse of discretion in cases involving: evidence in general, State v. Romero, 554 P.2d 216 (Utah, 1976), evidence of an expert witness, Lamb v. Bangert, 525 P.2d 602 (Utah, 1974), the materiality of evidence, Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah, 1977), and many others. See West's Pacific Digest 3, Appeal and Error XIV(f).

The rule that the appellate court will not overrule the judgment of the trial court absent abuse of discretion applies to the present case. As mentioned, the trial judge examined the witness himself to determine the reliability of the evidentiary records, State's Exhibit 1. The judge was satisfied that they were reliable and there is no indication of any abuse of discretion. The respondent urges this Court to uphold the decision of the trial court.

POINT II.

A.

THE STATE WAS NOT REQUIRED TO PROVE THAT THE SHOTGUN WAS OPERABLE IN ORDER FOR IT TO BE A DANGEROUS WEAPON.

The appellant was convicted of possession a dangerous weapon while on parole for a felony under § 76-10-503 Utah Code Ann., (1953), as amended. However, the state never proved that the sawed-off shotgun in the appellant's possession was capable of operation. The appellant contends

that absent this proof, he was not in possession of a dangerous weapon and therefore should not have been convicted. The Utah Supreme Court in State v. Nielson, 554 P.2d 489 (Utah, 1975), held that a gun was a dangerous weapon whether it was loaded or unloaded. The respondent argues that for there to be any merit to the appellant's argument on this point, the court would apparently need to reverse its decision in Nielson and hold that for a gun to be a dangerous weapon it would need to be loaded and otherwise capable of operation. The appellant is seeking a reversal of Nielson. (Appellant's brief, page 15).

The respondent urges this Court to uphold its decision in Nielson and rule that the sawed-off shotgun in the appellant's possession was a dangerous weapon, whether the state proved it was capable of operation or not. It is the position of the majority of jurisdictions that have addressed the issue that a firearm is a dangerous weapon whether loaded or unloaded. See Reed v. State, 199 So.2d 803 (Miss. 1967); People v. Law, 39 A.D. 2d 904, 334 N.Y.S. 2d 398 (1972); State v. Dorsey, 491 S.W. 2d 301 (Mo. 1973); United States v. Ware, 315 F. Supp. 1333 (1970). The law stating that a gun is a dangerous weapon whether loaded or not is based on sound reasoning. In State v. Quail, 5 Boyce 310, 92 A. 859 (Del. 1914), the Court said:

> We think it quite immaterial whether the revolver be loaded or not, because such an instrument is commonly regarded as a deadly weapon without regard to its condition. If the absence of bullts would make the weapon a harmless one, then any condition that would prevent its being used at the time injuriously, would have a like effect. For example, the main spring might be out of order, and according to the defendant's contention this would make the instrument not deadly within the meaning of the statute.
>
> If we should sustain the contention of the defendant we fear that many persons would carry a pistol unloaded but at the same time have bullets secreted upon their person to be used if desired.
>
> As we have said the law was intended to discourage and prevent so far as possible, the carrying of weapons that are commonly and rightfully regarded as deadly. We think that a revolver, even though unloaded or in such a defective condition that it could not be fired, cannot be lawfully carried in this state concealed upon the person. The motion of the defendant is refused.

In relationship to § 76-10-503(2), Utah Code Ann., (1953), as amended, "Possession of a dangerous weapon while on parole for a felony," whether a sawed-off shotgun is capable of operation is not the main concern. The real issue is that a person possessing a sawed-off shotgun, operable or not, has power over others through the threat of death of serious bodily injury. This Court said in Nielson, "We believe

the statute's purpose was to deter those convicted of violent crimes from thereafter having guns, loaded or not."

In People v. Halley, 268 N.E. 2d 449, the Illinois appellate court said:

> We think it clear, however, that it was not a necessary part of the state's case to prove that the pistols were loaded with bullets, contained a firing pin, had open barrels or were otherwise in an operable condition. It is established that it is unnecessary to prove that a gun is a deadly weapon. People v. Merritt, 367 Ill., 521, 12 N.E.2d 7; People v. Dwyer, 324 Ill. 363, 155 N.E. 216.

The ruling in Halley applies directly to this case. The trial court did not need to prove that the shotgun was operable and therefore dangerous, because the Utah Supreme Court had already held that a gun is a dangerous weapon, whether loaded or not.

B.

BECAUSE THE STATE WAS NOT REQUIRED TO PROVE THAT THE SHOTGUN WAS A DANGEROUS WEAPON, THE APPELLANT'S CONVICTION OF A SECOND DEGREE FELONY WAS CORRECT.

Because of the reasoning in Point II A. above, the appellant was properly convicted of "possession of a dangerous weapon while on parole for a felony," under Utah Code Ann., § 76-10-503(2) (1953), as amended, a second-degree felony. Utah Code Ann., § 76-3-203(2) (1953), as

amended, sets forth the term of imprisonment for a second-degree felony as follows:

> Felony conviction--Indeterminate term of imprisonment--Increase of sentence if firearm used--A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows:
>
> (2) In the case of a felony of the second degree, for a term at not less than one year nor more than 15 years but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently;

The appellant was sentenced to 1 to 15 years at the Utah State Prison in accordance with Utah Code Ann., § 76-3-203(2) (1953), as amended, and there was no error in imposing this sentence. This sentence should be upheld.

POINT III.

IF THE TRIAL COURT DID COMMIT ERR, THE PROPER REMEDY SHOULD BE A RE-TRIAL.

Utah Code Ann., § 76-1-501 (1953) as amended, provides:

> (1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

Emphasis added.

The appellant contends that on the basis of this statute and Points I and II of his brief, the appellant should be acquitted. The respondent argues that even if this Court should find that the trial court erred, despite the arguments of Point I and II herein, the proper remedy is not acquittal, but a new trial. Respondent submits that the appellant again places too narrow of an interpretation upon the statute in question. Utah Code Ann., § 76-1-501 (1953), as amended, states, "In absence of such proof, the defendant shall be acquitted." In the present case, even if the trial court did err by allowing the alleged hearsay evidence, (Point I), to be entered into court, this issue can be remanded and proven by the very evidence the appellant alleged would have been proper at trial. There was no absence of proof at the trial court, but merely the use of proof to which the appellant objected.

In State v. Lawrence, 120 Utah 323, 234 P.2d 600 (Utah, 1951), the Utah Supreme Court said when speaking about the value of stolen property in a larceny case:

> The major portion of the Attorney General's brief deals with the contention that if the failure to prove value requires a reversal of the case, the defendant is not entitled to go free, but only to a new trial. With this we agree. It is well settled that reversal of a conviction at the instance of the defendant, and subsequent remand of the case for new trial does not constitute the defendant twice in jeopardy to entitle

him to go free. 15 Am. Jur. 89, Crim. Law, Sec. 427; People v. Travers, 77 Cal. 176, 19 P. 268; People v. Eppinger, 109 Cal. 294, 41 P. 1037; People v. Stratton, 136 Cal.App. 201, 28 P.2d 695. And see Sec. 105-39-2, U.C.A. 1943, and State v. Kessler, 15 Utah 142, 49 P. 293.

Appellant submits that this case is supplanted by Utah Code Ann., § 76-1-501 (1953), as amended, and thus the appellant should be acquitted. Respondent submits that appellant badly misconstrues both the statute and the ruling of Lawrence. The Lawrence case held that the remand of a case did not violate the constitutional guarantee of protection against double jeopardy. This issue is completely distinguishable from the absence of proof issue in Utah Code Ann., § 76-1-501 (1953), as amended. State v. Lawrence, was reaffirmed in 1971 by the Utah Supreme Court in State v. Jaramillo, 481 P.2d 394 (Utah, 1971), and is in accordance with the United States Supreme Court cases of North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 2089, 23 L.Ed. 2d 656 (1969), and Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed. 2d 714 (1973).

Utah Code Ann., § 77-42-3 and 77-42-4 (1953), as amended, make it clear that the Supreme Court has the power to order a new trial if it deems necessary. Utah Code Ann., § 77-1-501 (1953), as amended does not bind the Supreme Court

into acquitting the appellant because in this case there is sufficient evidence. Therefore, if this Court finds that there was error at the trial, the case should be remanded for retrial, but the appellant should not be acquitted.

CONCLUSION

The arguments raised by appellant in seeking to have his conviction for the offense of possession of a dangerous weapon while on parole for a felony, Utah Code Ann., § 76-10-503(2) (1953), as amended, are without merit.

The trial court found that the evidence relied upon to establish that the appellant was on parole for a felony was reliable and fell within the hearsay exceptions. The jury convicted the appellant of being in the possession of a dangerous weapon, i.e.: a sawed-off shotgun, and it was unnecessary for the State to prove that this sawed-off shotgun was capable of operation, loaded or not. Based upon the foregoing points and authorities, appellant's conviction was proper and should be affirmed.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorneys for Respondent