

1980

State of Utah v. Thomas Wyman Berg : Brief of Amicus Curiae

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	BRIEF OF AMICUS CURIAE
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
THOMAS WYMAN BERG,	:	Case No. 16548
	:	
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE

This is an appeal from a judgment and conviction in the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable George E. Ballif, Judge presiding.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	BRIEF OF AMICUS CURIAE
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-v-	:	
	:	
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	:	
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from his conviction by the Honorable George E. Ballif, Fourth District Judge, sitting without jury, of the offense of Distribution of a Controlled Substance where nothing for value was exchanged. He further appeals from the Court's failure to find that the State's principal witness against him was his accomplice and from the Court's failure to require corroboration of the accomplice's testimony.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty on May 25, 1979, by the Honorable George E. Ballif of a violation of Utah Code Ann. §58-37-8(1)A(c) (1953), distributing a controlled substance, marijuana, where nothing for value was exchanged.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of judgment of guilt rendered against him and a new trial in the above entitled matter. Amicus Curiae seeks a ruling from this Court that Utah Code Ann. §77-31-18 (1979 amended version) cannot be applied retroactively.

STATEMENT OF THE FACTS

The primary witness against the appellant was one Jill Hales who testified that she had received marijuana from the appellant on November 21, 1978 (T. 16) and sold it to an undercover agent, Craig Wiseman (T. 18). She was subsequently arrested and after being threatened with prison and the loss of her child, she agreed to accept a grant of immunity in exchange for her testimony against the appellant (T. 30). The case was tried on May 24, 1979, and the trial court ruled that the accomplice corroboration statute, Utah Code Ann. §77-31-18 (1979 amended version) which had taken effect on May 8, 1979, was to be applied in this case.

ARGUMENT

THE APPLICATION OF THE AMENDED VERSION OF THE ACCOMPLICE CORROBORATION STATUTE ALLOWED THE APPELLANT TO BE CONVICTED ON THE BASIS OF LESS EVIDENCE THAN THE LAW REQUIRED AT THE TIME OF THE COMMISSION OF THE OFFENSE, THUS VIOLATING THE EX POST FACTO CLAUSES OF THE CONSTITUTIONS OF BOTH UTAH AND THE UNITED STATES.

The appellant was convicted of the offense of Distribution of a Controlled Substance where nothing of value is exchanged, which was alleged to have occurred on or about November 21, 1978. At that time, Utah law required that a defendant could not be convicted on the testimony of an accomplice. Utah Code Ann. §77-31-18 (1953 as amended) provided:

Conviction on testimony of accomplice.— A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

The 1979 Utah Legislature amended that statute to eliminate this corroboration requirement. The amended version of that statute became effective on May 8, 1979. Utah Code Ann. §77-31-18 now provides:

Conviction on uncorroborated testimony of accomplice— Cautionary instruction.— (1) A conviction may be had on the uncorroborated testimony of an accomplice.
(2) In the discretion of the court, an instruction to the jury may be given to the

effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable.

Testimony of an accomplice must be corroborated as required by the provision of Utah Code Ann. §77-31-17 (1953 as amended) which was in effect at the time that the offense which is presently before the Court was alleged to have been committed. Any application of the 1979 amendment of Utah Code Ann. §77-31-18 (1979 amended version) would constitute an ex post facto application of the present statute and would be prohibited by both the Utah and United States Constitutions. This is because the 1979 amended version of the statute requires the State to produce less evidence to obtain a conviction than was necessary at the time that the offense allegedly occurred.

The Constitutions of the United States and the State of Utah both expressly prohibit any ex post facto law. Article I, Section 10 of the United States Constitution provides:

No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.

Article I, Section 18 of the Constitution of Utah provides:

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

The above provisions are commonly referred to as the ex post facto clauses, and was first given judicial interpretation in

Calder v. Bull, 3 Call, 386 (1798). In that case, the United States Supreme Court was faced with a question of the retroactive application of a change in probate laws by a state legislature. The Court first noted that the purpose for the enactment of the ex post facto clause, like other constitutional provisions, was to prevent abuses that had occurred in Great Britain prior to the revolution. The type of abuses that the ex post facto clause is aimed at includes acts that were made criminal by the legislature after the acts had occurred. Two important factors in the application of the ex post facto clause derive from this policy:

First, the clause applies primarily to criminal actions;
Secondly, the nature of retroactive application applies to the time that the offense was alleged to have been committed.

The Court in an often-quoted passage described four situations that it considered to be exemplary of ex post facto laws:

I will state what laws I consider ex post facto within the words and intention of the prohibition. 1st, every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d, every law that advocates a crime, or makes it greater than it was when committed. 3d, every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th, every law that alters the legal rules of evidence and receives less or different testimony, than the law required at the time of the commission of the offense in order to convict the offender. All these and similar laws, are manifestly unjust and oppressive.
3 Dall. 386, 390-391.

Although the Court did not find the ex post facto clause to be applicable in Calder v. Bull, supra, in Cummings v. Missouri, 4 Wall 277 (1866), the Court applied the criteria set forth in Calder v. Bull, supra, and found the statute in question there to be an ex post facto law because it retroactively made past acts criminal. The statute in Cummings v. Missouri, supra, required people to take an oath stating that they had always been loyal to the United States. The statute was enacted at a time immediately following the Civil War, thus making the acts of those loyal to the confederacy criminal.

Later, in Kring v. Missouri, 17 Otto 221 (1882), the Court struck down a death sentence resulting from a change in Missouri law. This change allowed the State to refile a higher degree of an offense after a defendant's conviction for a lower offense was reversed on appeal. The Court noted that the change in the law meant the difference between life and death for the defendant. The State had argued that the change in the law occurred prior to the defendant's plea to second degree murder and secondly, that the change was merely procedural and consequently was not affected by the ex post facto clause. The Court rejected both of these contentions. It noted that the ex post facto clause applied to the time at which the offense charged was committed stating, "This term necessarily implies a fact or act done after which the law in question is passed." 17 Otto 221, 225. The Court also rejected the State's argument that the change in the

law was merely procedural. It first noted that procedural matters involve pleading, evidence or practice which are not the subjects of the ex post facto clause. However, when a change in the law denies a defendant of a defense that he had at the time that the offense was committed or when the change affects any substantial right to his serious disadvantage, the ex post facto clause applies.

The distinction between substantive and procedural changes in the law, since that time, has been the dominate question in cases involving the ex post facto clause. The Court's decisions in this question provide some guidance in making this distinction. A reduction in the size of the jury in a felony prosecution was held to be a substantive change in the law. Thompson v. Utah, 170 U.S. 343 (1897). But a change in the law that placed higher qualifications on jurors was regarded as procedural. Cummings v. Mississippi, 162 U.S. 588 (1895). Substantive changes with respect to punishment generally involve a change in the nature of the punishment rather than the means of imposing it. A retroactive change in the law requiring a mandatory rather than a discretionary sentence, Lindsey v. Washington, 301 U.S. 397 (1936), or requiring solitary confinement rather than simple incarceration, Ex parte Medley, 134 U.S. 160 (1889), have been held to be subject to the restrictions of the ex post facto clause. However, a retroactive change in the means of imposing a specific sentence, such as electrocution rather than hanging for a death

sentence, Malloy v. South Carolina, 237 U.S. 180 (1914), or requiring the State to present more evidence and follow more stringent court procedures before imposing the death penalty, Dobbert v. Florida, 432 U.S. 282 (1977), were not prohibited by the ex post facto clause.

The final type of distinction that has been made deals with the amount of evidence required to prove an offense. In Hopt v. Utah, 110 U.S. 574 (1883), the rules of evidence were changed to allow a person who had previously been convicted of a felony to testify. The Court noted that this change merely expanded the class of persons allowed to testify, it did not deprive the defendant of a substantial right which he possessed at the time that the offense was committed. In upholding this retroactive change in the rules of evidence, the Court did not allow all such rules to be changed then applied in a retroactive manner. In making this distinction, the Court stated:

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. But alterations which do not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but leaving untouched the nature of the crime and the amount or

degree of proof essential to conviction, only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged. 110 U.S. 574, 594.

In Beazell v. Ohio, 269 U.S. 216 (1925), the Court held that a statutory change in the rules of joinder and severance operate to change only the mode of the trial and the Court analogized this to the situation where the rules of evidence have been changed. But with respect to changes in the rules of evidence, the Court stated that where the change in the law is with respect to the quantum and kind of proof encessary to establish guilt, then it is subject to the ex post facto clause. This is exactly the situation before this Court in the case at bar with respect to the change in the accomplice corroboration statute, Utah Code Ann. §77-31-18 (1953 as amended).

Prior to May of 1979, the accomplice corroboration statute, Utah Code Ann. §77-31-18 (1953 as amended) provided:

Conviction on testimony of accomplice.— A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

The Legislature in 1979 amended this statute and the law in effect in the State of Utah after May of 1979, provides:

Conviction on uncorroborated testimony of accomplice— Cautionary instruction.— (1) A conviction may be had on the uncorroborated testimony of an accomplice.

(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable.

As can easily be seen, the substantial difference between the two statutes is that previously a person could not be convicted upon the uncorroborated testimony of an accomplice, but now a person may be convicted on uncorroborated accomplice testimony. This means that under the statute in effect at the time that the State alleged that the offense which is the subject of this prosecution was committed more evidence was required to be produced than is now required to obtain a conviction. This is exemplified in the case law interpreting Utah Code Ann. §77-31-18 (1953 as amended). In State v. Lay, 38 Utah 143, 110 P. 986 (1910), the Court stated with respect to the accomplice corroboration statute:

Under the statute, the jury has no legal right convict a defendant upon the uncorroborated testimony of an accomplice, even though they believe the testimony of the accomplice to be true as to every material fact, and are convinced by it of the guilt of the defendant beyond a reasonable doubt.
110 P.986, 987-988.

This Court went on to note that the corroborative evidence must tend to connect the defendant with the commission of the offense, be consistent with guilt and inconsistent with innocence and do more than cast a grave suspicion on the accused.

Likewise, in State v. Somers, 97 Utah 132, 90 P.2d 273 (1939), the Court cited the accomplice corroboration statute and then stated:

Under the above section a conviction cannot be based on the testimony of an accomplice alone. There must be corroboration of his testimony. And the corroboration must be as to some material matter or fact which is inconsistent with defendant's innocence. And while it has been held that this corroborative evidence may be slight and may be established by circumstantial rather than direct evidence yet the evidence must do more than create a mere suspicion as to defendant's guilt. It must tend to connect defendant with the commission of the offense. And it is not sufficient corroboration to establish a motive merely.
[Citations omitted] 90 P.2d 273.

In that case, the Court also stated that if the State fails to present any evidence to corroborate the testimony of the accomplice then the trial court must dismiss the offense. If the State is able to present substantial evidence to corroborate the accomplice's testimony, the jury is to be instructed on the corroboration requirement and the weight of the corroborative evidence will be left to the jury. State v. Erwin, 101 Utah 365, 120 P.2d 285 (1941).

It is clear from the case law that the State could not obtain a conviction based solely on the testimony of accomplices.

Some additional evidence must be presented to prevent the case from being dismissed. Consequently, the amended version of Utah Code Ann. §77-31-18 (1979 amended version) is barred from retroactive application by the ex post facto clause, because to apply it retroactively would allow the State to obtain a conviction on less, or different evidence than was required at the time of the alleged commission of the offense, Calder v. Bull, supra.

Cases from other jurisdictions have reached the same conclusions with respect to similar changes in the law and the attempted retroactive application of those changes. In Government of Virgin Islands v. Civil, 591 F.2d 255 (3d Cir. 1979), the Court held that the repeal of the accomplice corroboration requirement which was the same as that previously in effect in Utah, could not be applied retroactively without violating the ex post facto clause. The statute in question there provided:

No conviction can be had upon the testimony of an accomplice unless it be corroborated by such other evidence as tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.
Virgin Islands Code Title 14, §17.

The statute had been repealed between the time of trial and argument on appeal. One of the issues raised on appeal was whether a conspirator was an accomplice within the meaning of the corroboration statute. Before this issue could be reached, the retroactive effect of the repealing of the statute had to be determined. The

Court held that such an action by the Legislature could have no retroactive effect as it would violate the prohibition on applying changes in the law in an ex post facto manner. In doing so, the Court stated:

Here the repeal of the corroboration statute reduces the amount of proof necessary for conviction. Unlike the permissible change in Hopt v. Utah, supra, the statute's repeal would "alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed." Id. at 589, 4 S.Ct. at 210. Since it would deprive the accused of a substantial right that the law gave them at the time of the robbery, Kring v. Missouri, supra, 107 U.S. at 232.2 S.Ct. 443, the repeal as applied to the case sub judice falls within the classes of changes prohibited by the ex post facto clause. See United States v. Henson, 159 U.S. App. D.C. 32, 46, 486 F.2d 1292, 1306 (D.C. Cir. 1973) (en banc). Accordingly, these cases must be decided as if §17 were still in effect. [Footnote omitted] 591 F.2d 255, 259.

Likewise, in Hart v. State, 40 Ala. 32 (1866), the accomplice corroboration statute had been repealed between the time the offense had occurred and the time of trial. The trial court had refused to require corroboration and on appeal the Supreme Court of Alabama held that the trial court's action violated the ex post facto clause because the change in the law ". . . altered a legal rule of evidence, and received less testimony than the law required at the time of the commission of the offense, in order to convict the offender." 40 Ala. 32, 35.

A somewhat similar problem was described in Plachey v. State, 239 S.W. 979 (Tex. 1922). That case involved a situation where the Texas Legislature changed the liquor sales statute so that the buyer of illegally sold liquor would not be an accomplice. Since Texas had an accomplice corroboration statute similar to the former Utah statute, illegal sellers of liquor were then subject to convictions based solely upon the testimony of the buyers. The retroactive change in the law in that case occurred between the time of the sale and the trial, and the trial court refused to instruct the jury on the requirement for corroboration of an accomplice's testimony. The appellate court held that such a ruling by the trial court violated the ex post facto clause because it allowed for a conviction to be had on less evidence at the time of trial than the State was required to produce at the time of the offense.

At the time that the offense, which is subject of this prosecution, was alleged to have occurred, a person could not have been convicted solely on the testimony of an accomplice. The recent change in the law eliminated that requirement, thus making a conviction possible on the basis of less evidence than was previously required. To apply this change in the law to the appellant in the case in question here would relieve the State of a substantial part of its burden of proof that had to be met at the time that this offense was alleged to have been committed. Consequently, to apply the change in the accomplice corroboration

statute in a retroactive manner would violate the appellant's rights under the ex post facto clauses of both the United States and Utah Constitutions.

CONCLUSION

The appellant in this case cannot be convicted on the uncorroborated testimony of accomplices. To do otherwise — to proceed pursuant to the 1979 amended version of Utah Code Ann. §77-31-18 (1979 amended version) — would constitute a violation of the ex post facto clauses of both the United States Constitution and the Constitution of the State of Utah

DATED this ____ day of December, 1979.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing Brief of Amicus Curiae to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, and to Robert Van Sciver, Attorney for Appellant, 321 South Sixth East, Salt Lake City, Utah 84102, this _____ day of December, 1979.
