

1980

State of Utah v. Richard Lynn Carlson : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

RICHARD LYNN CARLSON,

Defendant-Appellant.

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION
OF A CONTROLLED SUBSTANCE WITH
VALUE IN THE THIRD JUDICIAL DISTRICT
LAKE COUNTY, STATE OF UTAH,
PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - - : - - - - -
STATE OF UTAH, :
Plaintiff-Respondent, :
-VS- : Case No. 16582 & 16583
RICHARD LYNN CARLSON, :
Defendant-Appellant. :

- - - - - : - - - - -
BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with two counts of possession of a controlled substance (heroin and marijuana) with intent to distribute for value, in violation of Utah Code Annotated § 58-37-8(1)(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before the Third Judicial District Court, the Honorable Peter F. Leary, sitting without a jury, and found guilty of both counts of possession of a controlled substance with intent to distribute for value. Appellant was sentenced on July 25, 1979, to two concurrent terms in prison, one from 0 to 5 years and the other from 0 to 15 years.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the judgments of the lower court.

STATEMENT OF THE FACTS

Although respondent is in substantial agreement with appellant's statement of facts, the record reveals the following additional facts which are pertinent to the resolution of the issues presented on appeal.

First, appellant had been under surveillance and suspected of illegal drug-related activity for two months prior to the execution of the search warrant. (Tr. 8, Vol. 1).

Second, items other than pistols, and quantities of marijuana and heroin were found during the search of appellant bedroom, including many items used in the production and sale of drugs, e.g. substances identified as cutting agents for heroin, a plastic bag sealing device and plastic bags the size used to bag "lids" of marijuana, a balance scale capable of weighing minute quantities of substances, other measuring devices (spoons, funnels). (Tr. 13, 14, 20, 40, 41, Vol. 1).

Third, appellant's bare reference to Deputy George's opinion testimony is misleading in its failure to note the Deputy's substantial experience upon which that opinion was based. Deputy George had been an undercover narcotic officer, which included joining the drug culture, buying drugs for a

predetermined amount of time and, at the conclusion of the undercover work, bringing his cases to Court (Tr. 7, Vol. 1). Deputy George's training in narcotics work included schooling at the University of Utah and at the police academy. Because of his knowledge and experience he had prepared a sheriff's office manual on narcotics usage and identification (Tr. 15, 16, 37, Vol. 2). With this background in mind, Deputy George's testimony that the amount of narcotics found in appellant's bedroom indicated a narcotics sales operation should be accorded great weight. (Tr. 38, 49-51, Vol. 2).

Fourth Mr. Jerry Campbell, Deputy Salt Lake County Attorney, denied under oath having had the discussion with police officers during the morning break to which appellant testified. (Tr. 89, Vol. 1). This testimony was corroborated by Officer Donald Bird (Tr. 108, 109, Vol. 1). Mr. Campbell did testify that a conversation was held in his office with the evidence custodians relating to the chain problem during the noon recess. There were some other officers milling around in the office, and there was quite a bit of confusion at that time in Mr. Campbell's office. (Tr. 90, Vol. 1). Officer Allen Sawaya, one of the evidence custodians, testified that such conversation was very minor, consisting only of Mr. Campbell telling Officer Sawaya to make sure he (Sawaya)

had the chain of evidence down (Tr. 121, Vol. 1). The other evidence custodian, Donald Bird, testified that he did not recall the specifics of the conversation between himself and Mr. Campbell during the lunch hour regarding chain problems (Tr. 108, Vol. 1).

ARGUMENT

IT IS WITHIN THE DISCRETION OF THE TRIAL COURT TO DECIDE THE APPROPRIATE REMEDY FOR A TECHNICAL VIOLATION OF AN ORDER EXCLUDING WITNESSES.

In State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936), this court considered whether, under an order excluding all witnesses from the courtroom except the one presently testifying, the trial court abused his discretion by permitting a witness to testify who was in the courtroom while another witness testified. The Court specifically held that it is within the discretion of the trial court to decide the remedy for violating an exclusion order:

It is a matter within the sound discretion of the trial judge as to whether a witness who has been present during part or all of the examination of any other witness should be permitted to testify in the face of an exclusion order.

61 P.2d at 1116.

Smith, supra, has never been overruled, and its logical basis, which still obtains today, is discussed below.

The Utah rule for excluding witnesses is found in Utah Code Ann. (Supp. 1975), § 78-7-4:

. . . in any cause the court may, in its discretion, during the examination of a witness, exclude any and all witnesses in the cause (emphasis added).

It is important to note that the statute says that the court "may" rather than that the court "must" exclude witnesses. The Utah Supreme Court supports this construction. In State v. Bonza, 72 Utah 177, 269 P. 480 (1928) the court held that a trial court may refuse to grant a request to exclude and that there is no absolute right to have any witnesses excluded. In the recent case of State v. Sanchez, No. 16103 (Utah May 8, 1980), this Court noted:

We have no doubt that in its inherent powers as the authority in control of the trial the court could exclude witnesses in any case where it appears there is good cause for doing so; and for the same reason he may properly direct that witnesses not talk to each other or to others during the trial.

Advanced Sheet at 2 (emphasis added).

This Court has also determined that whether the exclusion rule has been violated "is within the sound discretion of the trial court." State v. Dodge, 564 P.2d 312 (Utah 1977); see also State v. Vaughan, 554 P.2d 210 (Utah 1976).

Certainly if a trial court has the discretion to allow a witness who remained in the courtroom and who heard

all or part of the testimony of another witness to testify, it should have the discretion, in the face of an exclusion order, to examine any possible violation of that order, and determine what, if any prejudice has occurred, what, if any prejudice might occur if the "violating" witness should testify, and take appropriate action if any.

The Utah Supreme Court has held that it will not disallow any decision within the discretion of a trial court unless there is a clear showing of arbitrary and capricious abuse of that discretion. State v. Chambers, 533 P.2d 876 (Utah 1975). The presumption is that such discretion was properly exercised. Root v. State, 162 Tex. Crim. 382, 334 S.W. 2d 154, 157 (1960). In the instant case, there was no showing that the trial court arbitrarily and capriciously abused his discretion in permitting the witnesses to testify when there had been a violation of the exclusion rule. The trial court held a hearing, determined what, if any prejudice might result and judged, in his sound discretion, that the witness could appropriately testify.

The basic rule for accepting or excluding the testimony of a witness who has violated the exclusionary rule was set forth in Holder v. United States, 150 U.S. 91, (1893):

If a witness disobeys an order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his

conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.

Id. at 91 (emphasis added).

The invocation of the rule excluding and sequestering witnesses is within the sound discretion of the trial court. State v. Dodge, supra. Further, enforcement of the rule fashioning an appropriate remedy for a violation, and determining whether a violation is prejudicial to the defendant lies within the sound discretion of the trial court. State v. Ortiz, 88 N.M. 370, 540 P.2d 850 (1975); Hampton v. People, 171 Colo. 153, 465 P.2d 394 (1970); State v. Berger, 13 Wash. App. 974, 538 P.2d 533 (1975).

At the beginning of the trial in the instant case, on motion of counsel for appellant, the trial court invoked the exclusionary rule excluding all witnesses from the courtroom, and admonished the witnesses not to discuss their testimony about the case with anyone outside (Tr.5,6,Vol.1). After the noon recess, counsel for appellant called appellant to the witness stand. Appellant was sworn and testified that he had heard State's attorney, Jerry Campbell, discussing the case with several police officers, witnesses for the State, outside the courtroom during the morning recess.

Appellant testified that Mr. Campbell walked over to the officers seated on a bench and talked to them about the necessary chain of evidence: "We've got to establish a chain." (Tr.84,Vol.1). Mr. Campbell was sworn, and denied that the conversation related by appellant had occurred. Mr. Campbell's testimony was corroborated by Officer Donald Bird.

Mr. Campbell did have a conversation with the evidence custodians in his office relating to the chain problems during the noon recess while many other officers were milling around causing confusion. One of the evidence custodians, Allen Sawaya, testified that such conversation was very minor, while the other evidence custodian, Donald Bird, testified that he was in the room but did not even recall the specifics of the conversation.

The trial court noted that the ordinary circumstances would be that Mr. Campbell certainly might discuss individually with the witnesses what their testimony might be, but that such discussion with two witnesses together was a violation of the exclusionary rule. The trial court permitted the evidence to continue, however, subject to appellant's motion to strike. The motion to strike was later denied.

Having personally heard the testimony of all concerned, the trial court was able to judge the demeanor, the candor, the memory, etc., of the witnesses, and was able to weigh the possible prejudice, if any. After the full complete hearing the judge appropriately allowed the chain of possession testimony.

This Court has pointed out many times:

A finder of fact is not necessarily bound to accept as conclusive a testimony of a witness. His credibility may be impeached by self-interest or improbability so that it would be entirely within the realm of reason to discount or to entirely discredit it.

Nichol v. Wall, 122 Utah 589, 253 P.2d 355, 356 (1953).

The appellate court must view whatever inferences may be fairly and reasonably drawn from the evidence in the light most favorable to the verdict (judgment). State v. Simpson, 541 P.2d 1114 (Utah 1975); State v. Ward, 10 Utah 26 34, 347 P.2d 865 (1959); State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183 (1960). Here, it is a fair and reasonable inference that the trial court believed Mr. Campbell's testimony that the alleged conversation between him and the police officer witnesses allegedly overheard by appellant did not in fact occur, and that the conversation had between Mr. Campbell and the evidence custodians during the noon recess was only a technical violation of the exclusionary rule.

The case of State v. Presley, 110 Ariz. 46, 514 P.2d 1234 (1973), presented a factual situation similar to that in the instant case. There the witnesses were sworn, admonished to remain outside of the courtroom, and also admonished to refrain from discussing any of the facts of

the case among themselves or with anyone else except the attorneys. The county attorney was aware of the exclusion order. Nevertheless, on the second day of trial, he got two prosecution witnesses together into his office and went over their testimony in the presence of each other. The Arizona Supreme Court specifically held that since the granting of the sequestration of witnesses was within the discretion of the trial court, and since the judge could have refused the invocation of the rule, a fortiori he could excuse a partial violation of it. Even now, although Arizona has changed its rule and requires the exclusion of witnesses on request of counsel, discretion remains in the trial court to determine what sanctions, if any, are necessary for a violation of the rule excluding witnesses. State v. Navarrette, 115 Ariz. 574, 566 P.2d 1050 (1977).

Appellant would rely on Dodge, supra, as authority to support the proposition that where a motion to strike or exclude the violating witnesses' testimony is made, as was the case here, such motions represent the only remedies for a violation by a witness of the exclusionary rule. This is a distortion of the Dodge decision. Nowhere in the Dodge decision does this Court suggest that a trial court

is without discretion in fashioning the remedy it considers proper for a witnesses' violation of the exclusionary rule. As the Utah Supreme Court stated in Del Porto v. Nicolo, 495 P.2d 811 (Utah 1972):

Where the trial is to the court, the rulings upon the admissibility of evidence are not required to be so strict, nor are they of such critical importance as where the trial is to the jury. This is so because it is assumed that the trial judge has superior knowledge as to the competence and effect which should be given evidence, and that he will make his findings and d-cisions in conformity therewith.

Id. at 814.

Respondent submits that since the sequestration of witnesses in Utah is a matter within the sound discretion of the trial court, and that since the trial court could have refused the invocation of the rule, the trial court in his sound discretion could excuse a violation of the rule. State v. Smith, supra.

POINT II

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE APPELLANT COULD BE CONVICTED OF THE CRIME OF POSSESSION OF NARCOTICS WITH THE INTENT TO DISTRIBUTE.

It is well established in Utah that in order for a convicted defendant to succeed in challenging the sufficiency of evidence adduced at trial, he must establish

that the evidence was so inconclusive or insubstantial that reasonable minds must have entertained reasonable doubt that the defendant committed the crime. State v. Daniels, 584 P.2d 880 (Utah 1978); State v. Wilson, 565 P.2d 66 (Utah 1977); State v. Jones, 554 P.2d 1321 (Utah 1976). Such cases also establish that in considering insufficiency of the evidence in cases with conflicting evidence, this Court must assume that the trier of fact believed those aspects of the evidence supporting the verdict, and also drew the reasonable inferences therefrom which support the verdict.

. . . we are obliged to assume on appeal that the jury believed those aspects of the evidence which support the verdict; and that, in doing so, there is a reasonable basis therein upon which the jury could believe that the defendant committed that offense as charged.

State v. Gandee, 587 P.2d 1064 at 1065-1066 (Utah 1978).

See also State in the Interest of M.S., 584 P.2d 914 (Utah 1978), establishing that the same principle applies to bench trials.

The reason for the rule, of course, is that the finder of fact is best able and legally responsible to judge the demeanor of witnesses, determine who is telling the truth, determine the weight to be given to the testimony of each witness, etc.

Appellant argues that the evidence did not exclude every reasonable hypothesis. In State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970), this Court reaffirmed the proposition that a conviction can be had on circumstantial evidence if it excludes every reasonable hypothesis except the guilt of the defendant. The Court went on to state:

Unless upon our review of the evidence, and the reasonable inferences fairly to be deduced therefrom, it appears that there was no reasonable basis therein for such a conclusion, we should not overturn the verdict.

Id. at 247.

Surveying the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the trial court's judgment, it cannot be said that a reasonable finder of fact would necessarily entertain some substantial doubt of appellant's guilt.

In State v. John, 586 P.2d 410 (Utah 1978), this Court required that the reasonable hypothesis must flow from substantial, credible evidence:

Consequently, if there is any reasonable view of the credible evidence which is reconcilable with the defendant's innocence, it would naturally follow that there would be a reasonable doubt as to his guilt. But we emphasize that this does not mean just

any view of any of the evidence, however unsubstantial or incredible, which a party to such a controversy may dream up.

The proper application of that rule requires that it be based upon . . . substantial and credible evidence. This is true because in performing their [its] duty as finders of the fact, they are the exclusive judges of the credibility of the evidence. In so doing they [he] may consider all of the facts affirmatively shown, as well as any unexplained areas, and draw whatever inferences may fairly and reasonably be drawn therefrom in the light of their own experience and judgment.

Id. at 412 (emphasis added).

In the instant case, the only issue was whether the appellant intended to distribute the controlled substances, or some part thereof, for value. The following evidence clearly supports the court's findings.

First, appellant constructively possessed the controlled substances. Courts have generally held that constructive possession may be proved by circumstantial evidence. State v. Floyd, 120 Ariz. 358, 586 P.2d 203 (1978); State v. Smith, 15 Wash.App. 716, 552 P.2d 1059 (1976); People v. Newman, 95 Cal.Rptr. 12, 484 P.2d 1356 (1971). The Utah Supreme Court has determined that the dominion and control of narcotics necessary to establish unlawful possession of narcotics neither means that the drug be found on the person of the accused nor

that the accused must have had sole and exclusive possession of the narcotic. State v. Winters, 16 Utah 2d 139, 396 P.2d 872 (1964); State v. Bankhead, 30 Utah 2d 135, 514 P.2d 800 (1973).

Convictions for unlawful possession of controlled substances may be based upon evidence that the controlled substance(s), while not found on the person of the defendant, was in a place under his dominion and control. Petty v. People, 167 Colo. 248, 447 P.2d 217 (1968). Similarly, the California Supreme Court has held that "the accused has constructive possession when he maintains control or right to control the contraband," and that "possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to his dominion and control" or which is subject to the joint dominion and control of the accused and another. People v. Francis, 75 Cal.Rptr. 199, 450 P.2d 591 (1969). The Supreme Court of Arizona has determined, in State v. Curtis, 114 Ariz. 527, 562 P.2d 407 (1977), that constructive possession is sufficiently established by proof that a defendant exercised control or right to control over the substance itself or the place in which the illegal substance was found. The controlled substances were found in a search of the appellant's bedroom in the instant case, which bedroom was undisputedly under appellant's control or which he had a right to control.

The search of appellant's bedroom yielded substantial quantities of marijuana and heroin. The search also yielded chemical substances identified by Deputy George as cutting agents for heroin, a plastic bag sealing device similar to such devices commonly used in the drug trafficking business to hermetically seal quantities of controlled substances, a balance scale capable of weighing minute quantities of substances, other measuring devices (spoons and funnels). The heroin was found inside an aerosol spray can with a false bottom.

In drawing fair and reasonable inferences from the evidence in the light most favorable to the verdict, the only logical result is that appellant possessed the controlled substances. It is also the only reasonable inference that appellant intended to distribute the controlled substances for value. Deputy George testified of his work as an undercover narcotic's officer and of his special training in narcotics work. George gave as his opinion that the heroin and marijuana found in appellant's bedroom were large amounts for sale, and not for personal use, that the heroin was in a quantity extremely large even for a heroin addict, and that a recent drug-selling trend

in the Salt Lake area was towards hermetically sealed packages of heroin, such as were found in appellant's bedroom.

The drug measuring and packaging devices also point directly and solely to distribution. A user does not have to package the drugs he has just purchased, which are already packaged by the seller. Also, the user does not need to precisely measure the quantities he is using. Appellant places much emphasis on the testimony of Bill Jenkins, a defense witness and friend of appellant, to the effect that he (Jenkins) had left the aerosol can containing the packets of heroin at appellant's residence before the search; however, Jenkins did not also leave the heroin cutting chemicals, the packaging device, the packaging materials, the marijuana, etc. The trial court is not required to accept as conclusive the testimony of a witness. Nichol v. Wall, supra. The trial court obviously gave far more weight to the testimony of Officer George which reasonably explained all of the facts, than to that of the defense witnesses, which left totally unexplained the cutting and packaging paraphernalia.

This Court, in State v. Bankhead, 514 P.2d 800 (Utah 1973), held:

Circumstantial evidence may be used to prove that the accused possessed the narcotics for sale rather than for his individual use. The quantity of the heroin involved and the nature of its packaging may support the inference that it was possessed for sale rather than for his personal use. Experienced officers may give their opinions in cases involving possession of heroin that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging, and normal use of an individual; convictions based on such testimony have been upheld.

Id. at 803 (emphasis added).

When the total evidentiary picture is viewed, the trial court was properly within its authority in finding appellant guilty. The language of the Utah Supreme Court in State v. Christean, 533 P.2d 872 (Utah 1975), is appropriate:

. . . the law does not require that the separate bits of evidence be viewed in isolation for it is proper to take whatever fragments of proof that can be found and piece them together with the reasonable inferences to be drawn therefrom in order to fill in the whole mosaic of the crime.

Id. at 876.

The trial court, having considered all the evidence and having made all "the reasonable inferences to be drawn therefrom" was able to weigh "the whole mosaic of the crime," and by deliberating with the full picture in mind,

determined that appellant was guilty beyond a reasonable doubt.

CONCLUSION

Whether or not witnesses are excluded from a trial is within the discretion of the trial court. If some technical violation of an order excluding witnesses occurs, it is certainly within the discretion of the court to fashion an appropriate remedy if necessary. The trial court did not abuse its discretion in allowing a witness to the mere chain of custody to testify after a possible, non-prejudicial violation of an exclusion order.

The evidence of the large quantity of drugs and concomitant processing and packaging devices possessed by appellant were well sufficient to support the court's guilty verdict.

Respectfully submitted,

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