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

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,)

Plaintiff-Respondent,)

vs.)

Case No. ~~16585~~ 16582 + 16583

RICHARD LYNN CARLSON,)

Defendant-Appellant.)

BRIEF OF APPELLANT

APPEAL FROM CONVICTION OF TWO COUNTS OF POSSESSION
OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE
IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE PETER F. LEARY, PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

PLAINTIFF-RESPONDENT,

CASE NO. 16585

VS

RICHARD LYNN CARLSON,

DEFENDANT-APPELLANT

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of two counts of possession of a controlled substance with intent to distribute for value, in violation of U.C.A. 58-37-8 (1) (a) (ii) (Tetrahydracannabinol).

DISPOSITION IN THE LOWER COURT

The Honorable Peter F. Leary, sitting without a jury, found Appellant guilty of two counts of possession of a controlled substance with intent to distribute for value.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the convictions.

STATEMENT OF FACTS

On or about August 31, 1978, a team composed of University of Utah police officers, and officers from Salt Lake City and Salt Lake County, executed a search warrant at 5134 Jolley Street, in Salt Lake County, Utah. There they found the Appellant, Richard Lynn Carlson, and his wife, Margaret Carlson.

The search yielded various items from the house, including two pistols (State's Exhibits 2 and 3), five bags, containing marijuana (State's exhibit 18), and an aerosol can with a false bottom, containing six (6) bags of a substance later determined to be heroin (State's Exhibit 6). Also received were two copies of the evidence list made at the scene (Defendant's Exhibits 19 and 26).

The case was tried without a jury before the Honorable Peter F. Leary. All witnesses were sworn, and the exclusionary rule was invoked as to the witnesses (T. 5, 6). As the police officers began testifying, it became apparent that there were problems in the establishment of the chain of evidence of certain items found in the home.

After the noon recess, on the first day of trial, counsel for the Appellant brought to the Court's attention the fact that counsel for the State, Jerry Campbell, was overheard discussing the case with several officers. The Appellant was sworn and testified that he overheard counsel for the State remark to the witnesses, "We've got to establish a chain!"

When one of the Witnesses asked, "How do we do that?", Mr. Campbell was said to have replied, "Just do it!" (T. 85) Jerry Campbell was sworn and admitted that he had a conversation with several of the officers together (T. 90). The chain problem was discussed (T. 90.) Based upon this testimony, defense counsel made a motion to limit any further testimony from the officers involved. The Court admitted the evidence subject to a motion to strike at a later time, noting that the facts showed a clear violation of the Exclusionary Rule (T. 91.).

The remainder of the trial consisted of admitting some of the items seized in the search of the home for the State's evidence. Deputy Michael George testified that, in his opinion, the amount of narcotics found would indicate they were held for sale rather than for personal use (T. 37, Vol 2.).

At the end of the State's case, defense counsel made a motion to dismiss as to Margaret Carlson which motion was taken under advisement by the Court.

Margaret Carlson testified that she knew of no narcotics in the house except for a small amount of marijuana which her husband kept for his personal use (T. 99, Vol. 2)

Bill Jenkins was called and after being admonished about his right against self-incrimination, as provided by the Fifth Amendment to the United States Constitution (T. 129-135, 160), testified that he was a user of heroin and that he had left an aerosol can, containing heroin, in Appellant's residence approximately one (1) hour before the search warrant (T 163, Vol. 2) was executed.. He testified further that no one knew of the contents of the container (T. 164, Vol. 2).

John Peterson and Lynn Williams were called, and testified to being former heroin addicts familiar with drug use. They testified to the fact that the amount of narcotics found in the Carlson home would not be an unusual amount for personal use.

The defense rested, and the Court granted defense counsel's motion to dismiss, as to Margaret Carlson. Defense counsel renewed his motion to strike the testimony with respect to the "chain testimony", based upon the violation of the Exclusionary Rule. The Court took the matter under advisement, and later denied the motion. Appellant was found guilty of two counts of possession of a controlled substance, with intent to distribute for value, from which verdict he now appeals.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN
DENYING APPELLANT'S MOTION
TO STRIKE TESTIMONY WHICH
WAS TAINTED BY A CLEAR VIOLATION
OF THE EXCLUSIONARY RULE.

In the case before the Court, the Appellant was convicted of two counts of possession of a controlled substance with intent to distribute for value, in violation of U.C.A. 58-37-8(1)(a)(ii), 1953, as amended. Amounts of marijuana and heroin were found at Appellant's residence pursuant to a search warrant.

At the beginning of the trial, which was conducted without a jury, counsel for Appellant moved that the Exclusionary Rule, as to witnesses, be invoked, which motion was granted (T. 5, 6). All potential witnesses for the state were sworn and properly admonished. Much of the trial consisted of the introduction of evidence consisting of items taken from Appellant's residence pursuant to the search warrant. During the first morning of trial, it became apparent that there were certain problems with the chain of custody of some critical items of evidence. Defense

counsel made numerous objections on that basis, which were sustained by the trial judge. (T. 53, 63).

After the noon recess, defense counsel called the appellant to the stand to testify as to a conversation he overheard between the prosecutor and the police officers. (T. 84-86) Counsel for the State, Jerry Campbell, was sworn and admitted to a conversation between himself and the officers who served as evidence custodians in the search. He also admitted that the chain of evidence problem was discussed. (T. 90). Defense counsel moved to limit further testimony by the officers involved (T. 91). The Court permitted the evidence to continue, subject to a motion to strike, which motion was later made and denied.

The Court ruled that the Exclusionary Rule had been violated. Judge Leary stated:

"But as I recall, the ordinary circumstances would be that you certainly might discuss individually with the witnesses what their testimony might be, or any matter in connection with.... but when you have two of them together, it certainly is a violation of the Rule in regard to exclusion of witnesses, and that's clear." (T. 91, 92).

When the Exclusionary Rule is blatantly and clearly violated, as it was in this case, the law is clear. In State v.

Dodge, 564, P. 2d, 312 (Utah 1977), this Court encountered a similar situation. The prosecutor discussed the case with several witnesses in a group. When the violation was brought to the Court's attention, defense counsel made a motion for a mistrial. The motion was denied, and this Court affirmed that decision (See, State v. Dodge, supra, at 313). The basis of the Court's ruling in Dodge was that 1) a less drastic corrective measure was available to counsel; and 2) no prejudice to Appellant was shown. The Court stated:

"The trial court had other alternatives to the mistrial the Appellant requested. A motion to strike or exclude the violating witnesses' testimony could have been made. State v. Dodge, supra at 313.

Counsel for Appellant availed himself of these options as suggested by this Court. The motions were denied. Continued testimony as to the chain was heard and allowed to stand. And, not surprisingly, the disputed items of evidence were later linked up in the chain and admitted (See the List of Exhibits contained in the record herein.)

That the Exclusionary Rule was violated is undisputed, and the lower court so ruled (T. 91). Counsel for defense made the proper motions, as suggested by this Court. That appellant was prejudiced is also clear from the fact that the chain problems evidenced in the morning session were later "cured".

As to the issue of prejudice, Appellant draws the Court's attention to what was said by Justice Maughn in dissenting in the Dodge case:

"Where a discussion of the evidence to be put before the Court constitutes a violation of the rule, intrinsic to that violation is prejudice." State v. Dodge, supra, at 313 Emphasis Added.

The prejudice is all the more serious where the evidence against the accused is wholly circumstantial. In the case before the Court, the only evidence was that controlled substances were found on the premises. No evidence linked appellant to the evidence or showed that he exercised dominion or control over the items. Again, quoting Justice Maughn:

"Here it would appear the evidence which was used to convict was tainted by violation of the rule. In addition, there was no direct evidence - it was all circumstantial. In this kind of situation, I would conclude the matter should be reversed and remanded for a new trial. State v. Dodge, supra, at 314.

Lest the Exclusionary Rule be rendered a nullity, with no method of enforcement, this Court should hold that the lower

Court erred in not striking the testimony tainted by violation of the Rule, and reverse the conviction.

POINT II

THE EVIDENCE IN THE LOWER COURT WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS

It is axiomatic that, in a criminal prosecution, the State must prove each and every element beyond a reasonable doubt. The information charged Appellant with two counts of possession of a controlled substance with intent to distribute for value, U.C.A. 58-37-8(1)(a)(ii), 1953, as amended. It was therefore incumbent upon the State to prove: 1) that the Appellant possessed a substance; 2) that the substance was a controlled substance as defined by statute and 3) that he had the intent to distribute it for value.

There is no dispute that controlled substances were found on the premises. However, that was all that the State proved. The only evidence was that some marijuana and heroin were found at the residence (State's Exhibits, 18P and 6P, respectively.) The residence was occupied jointly by the Appellant, his wife, and five children. Most of the evidence seized was in the northwest bedroom, where Appellant and his wife slept. There is no

evidence in the record which would tend to show that appellant "possessed" the substances.

Possession has been defined as "having control over a place or thing with knowledge of and intent to have such control". State v. Faulkner. 220 Kan. 153, 551 P. 2d 1247 (1976). In other words to prove possession, the State must prove that a person exercises dominion or control over an item. That proof is totally lacking here.

Mere presence of an accused at a place where a narcotic drug is found is insufficient to show knowledge of the drug's presence (State v. Mosley, 119 Ariz. 393, 581 P. 2d 238 (1978); Sullateskee v. State, 428 P. 2d, 736, (Okla., 1967)). It should be noted that the Appellant's wife, another occupant in the home, was also charged in this case with the same crime. A motion to dismiss as to the charges against her was granted by the Court (T. 218, Vol. 2). Yet there appears no evidence to show that appellant should be treated any differently on the issue of dominion of control than his wife. In fact, as regards the heroin, Bill Jenkins was called, and testified that he, Bill Jenkins, had left the heroin there at the Carlson residence one hour before the search, without appellant's knowledge. This testimony came even after Mr. Jenkins had been informed of the fact that he may have been incriminating himself (T. 160-161) as to

a felony.

The record does not disclose any evidence relating to appellant's possession. The only evidence unfavorable to appellant consists of the circumstantial evidence, the presence of narcotics in the home. Where evidence is wholly circumstantial, and facts and circumstances in evidence are of such a character as to fairly permit inference consistent with innocence, it cannot be regarded as evidence sufficient to support conviction. Jackson v. State, 403 P. 2d 518, (Okla. 1965).

This court has held that where the only evidence pointing to guilt is circumstantial:

"...in order to warrant a conviction the evidence must exclude every reasonable hypothesis other than the defendant's guilt." State v. John, 586 P. 2d 410,411 (Utah 1978), and cases cited therein, at Note 2.

As to the evidence with respect to possession of heroin by the appellant, the test espoused in John is not met. The testimony of Mr. Jenkins, given voluntarily, despite the possibility of his being prosecuted for a felony, raised a reasonable and undisputed hypothesis pointing to appellant's innocence. It should also be noted that Mr. Jenkins came forward with this information both to appellant and appellant's counsel, as soon as he learned of appellant's arrest (See defendant's exhibits 31D and 32D). The instant case being wholly circumstantial, the evidence is insufficient to support the convictions and this Court should reverse the convictions.

CONCLUSION

In the instant case, appellant was convicted on the basis of circumstantial evidence. Critical items of evidence were introduced at trial, over objection after the exclusionary rule was clearly violated. The conference between Mr. Campbell and the officer-witnesses concerned the chain of custody problems, which were vigorously disputed by defense counsel. Later the items were linked up and admitted, thereby prejudicing the appellant.

The State did not prove possession, a necessary element for the crime charged, beyond a reasonable doubt. No evidence was offered to show appellant's dominion or control over the items of contraband. There is insufficient evidence to support the convictions. For these reasons the Court should reverse the convictions.

Respectfully submitted,

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