

1979

James H. Hupp v. Hon. S. Mark Johnson, Judge of The Circuit Court, State of Utah, Davis County, Bountiful Department : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

JAMES H. HUPP,)
)
Petitioner-Appellant,)
)
vs.)
)
HON. S. MARK JOHNSON,)
Judge of the Circuit Court,)
State of Utah, Davis County,)
Bountiful Department,)
)
Defendant-Respondent.)

Case No. 16603

BRIEF OF APPELLANT

Appeal from the Judgment of the Second
District Court for Davis County,
Hon. Duffey Palmer, Judge

L. E. RICHARDSON
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Salt Lake City, Utah 84111

Attorney for Petitioner-Appellant

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Davis County Courthouse
Farmington, Utah 84025

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FILED

SEP 27 1979

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| vs. |) | |
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STATEMENT OF THE NATURE OF THE CASE

Petitioner petitioned the District Court for an Extraordinary Writ prohibiting the defendant from further proceedings under a criminal complaint charging petitioner with the offense of driving while under the influence of intoxicating liquor, and ordering the Circuit Court to dismiss the charge.

DISPOSITION IN THE LOWER COURT

The lower court, after hearing arguments of counsel on the 19th day of July, 1979, found that the offenses with which petitioner was charged were all separate offenses, did not constitute a single criminal episode, and denied the Petition.

RELIEF SOUGHT ON APPEAL

That the Order of the District Court denying the Petition be reversed, the Petition granted, and an Order issued prohibiting further proceedings by the Circuit Court and ordering said Circuit Court to dismiss the charge against the petitioner.

STATEMENT OF FACTS

Petitioner was arrested on the 5th day of January, 1979, at approximately 1:50 a.m., and thereafter was charged by separate ticket complaints with the following offenses: driving under the influence of alcohol (Summons & Complaint No. A09208-R9); driving with an expired Utah driver's license (Summons & Complaint No. A09209-R10); driving with an expired Utah state vehicle registration (Summons & Complaint No. A09210-R11); and driving with expired Utah state vehicle inspection (Summons & Complaint No. A09211-R12).

Thereafter, within the time specified in said Summons and Complaints, petitioner appeared in the Davis County Circuit Court, Bountiful Department, and entered pleas of guilty to three of the offenses, to wit: driving with an expired Utah driver's license, driving with an expired Utah state vehicle registration, and driving with an expired Utah state vehicle inspection; which said pleas were accepted by the Court, and petitioner was sentenced therefor. Petitioner also entered a plea of not guilty to

the charge of driving under the influence of alcohol.

Thereafter, on the 22nd day of May, 1979, petitioner was charged in a formal Complaint with driving under the influence of intoxicating liquor on the 5th day of January, 1979. Trial having been set for that date, petitioner appeared through counsel, and moved the Court to dismiss the charge on the grounds and for the reason that prosecution was barred under the provisions of 76-1-403 1953 as amended.

The Court denied this said Motion, and also of a Motion for Continuance, proceeded to try petitioner in absentia, found petitioner guilty of the charge, and set a date for sentencing. Petitioner, on the 29th day of May, 1979, filed his Verified Petition in the District Court of Davis County, State of Utah.

ARGUMENT

I. THE OFFENSES INVOLVED HEREIN CONSTITUTE A "SINGLE CRIMINAL EPISODE," AND ARE CLEARLY WITHIN THE PURVIEW OF 76-1-401 (et seq.) U.C.A., 1953, AS AMENDED.

A. All Charges Grew Out of a "Single Criminal Episode."
76-1-401 U.C.A., 1953, as amended, defines a "single criminal episode" as

. . . all conduct which is closely related in time and is incident to an attempt to an accomplishment of a single criminal objective. (Emphasis added.)

In State v. Cornish, 571 P.2d 577, and State v. Ireland, 570 P.2d 1206, the Utah Supreme Court emphasized that the test to be applied in determining the existence of a

"single criminal episode" includes closeness in time and singleness of criminal objective.

The offenses with which petitioner was charged all involved the same act of driving, and were not only close in time but occurred simultaneously, which completely satisfies the "closely related in time" provision of 76-1-401 U.C.A., 1953, as amended.

All of the offenses with which petitioner was charged require, as an essential element, the driving of the vehicle. In this instance, the charges before the Court alleged that petitioner's vehicle was operated in Davis County on January 5, 1979, at 0150 hours [it is to be noted that the original Summons & Complaint charged the offense of driving under the influence of alcohol on 5 December 1979. However, in the formal Complaint, this was changed to driving while under the influence of intoxicating liquor on January 5, 1979 (R-9 and R-13)]. Thus, at the time of his arrest, petitioner was operating his vehicle with a "single criminal objective," i.e., to operate said vehicle illegally. "Criminal objective" is to be defined in terms of the act by which the law is broken. In this case, it was the petitioner's objective to perform the act of driving a vehicle illegally. All counts stem from this single act. Further, none of the offenses herein charged is illegal until such time as it is combined with the driving of a vehicle. Because all charges occurred simultaneously and grew out of a single

criminal objective, they comprise a "single criminal episode" under 76-1-401 U.C.A., 1953, as amended.

B. Petitioner Is Entitled To The Protection Of The Statutory Bars Raised By 76-1-402 and 76-1-403, U.C.A., 1953, as amended.

76-1-402(1) and (2)(a)(b) U.C.A., 1953, as amended, provide:

76-1-402. Separate offenses arising out of a single criminal episode.--(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision. (Emphasis supplied.)

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

Under the above provisions of 76-1-402(1), a defendant shall be punished only under one such provision where the same act of the defendant is punishable under different provisions. In this instance, the only illegal and criminal act of the petitioner was the one instance of the driving of his vehicle, and since he has already been convicted and sentenced under three other statutory provisions for this one act, his prosecution under 41-6-44 U.C.A., 1953, as amended, on a charge of driving a motor vehicle while under the

influence of intoxicating liquors, is barred.

With regard to 76-1-402(2), the offenses with which the petitioner was charged were all Class B misdemeanors, and are within the jurisdiction of the Circuit Court, the necessity for which was pointed out in the case of State v. Sosa, #15929, filed July 5, 1979. Also see State v. Cooley, 575 P.2d 693.

Further, since all of the offenses were committed simultaneously, in the presence of the arresting officer, were all known to the Court at the time of petitioner's original appearance, and since the prosecuting attorney is an officer of the Court, it would appear that the requirement that the offenses be known to the prosecuting attorney has been satisfied (T-6). Any other conclusion would result in a prosecuting attorney being able to thwart the legislative intent in the passage of a statute merely by shirking his duties and professing ignorance. At the very least, the prosecuting attorney in this matter should be presumed to know of the offenses, or in the alternative estopped to deny that which is common knowledge to the police and the Court, and which it is his duty to know.

76-1-403(1) (a) and (b) (ii) U.C.A., 1953, as amended, provide:

76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.--
(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or

a different offense arising out of the same criminal episode is barred if: (Emphasis added.)

(a) The subsequent prosecution is for an offense that was or should have been tried under section 76-1-402(2) in the former prosecution; and

* * *

(ii) Resulted in conviction. . . . (Emphasis added.)

76-1-403(3) defines the term "conviction" as follows:

(3) There is a conviction if the prosecution resulted in a judgment of guilt that has not been reversed, set aside, or vacated; a verdict of guilty that has not been reversed, set aside, or vacated; or a plea of guilty accepted by the court. (Emphasis added.)

In this case the pleas of guilty were not only accepted by the court but the petitioner was sentenced on the charges.

The District Court apparently based its denial of the Petition on the finding that the offenses with which petitioner was charged were all separate offenses, and therefore did not constitute a single criminal episode (R-15 and T-8). This result appears to confuse the distinction between "double jeopardy," which precludes the subsequent trial of a defendant for the same offense if he has been previously tried therefor, with the statutory bar granted by the legislature in 76-1-401 (et seq.) U.C.A., 1953, as amended, which repeatedly refers to separate or multiple offenses. (See State v. Sosa, supra.)

The purpose of the statute is separate and distinct from the protection afforded by the "double jeopardy" clause, in that it bars a multiplicity of trials where the various offenses could and should have been tried in a single trial in a single court, as is the case in this instance.

While the offenses charged here are not included in the Utah Criminal Code, it is apparent that 76-1-103 U.C.A., 1953, as amended, makes the provisions of the Utah Criminal Code govern prosecutions under any offenses outside the Criminal Code and would thus include the Title 41, U.C.A., 1953, as amended, violations with which petitioner was charged.

CONCLUSION

It is clear in this case that all of the offenses involving the petitioner occurred simultaneously, and involved the same illegal and criminal act, to wit: the driving of a vehicle; which said illegal criminal driving of the vehicle is the sole criminal objective of all of the offenses, and thus constitutes a single criminal episode.

Since all of the offenses were Class B misdemeanors, they are clearly within the trial jurisdiction of the Circuit Court, and could and should have been tried simultaneously.


All of the offenses were indisputably known to the arresting officer, and the Court, at the time petitioner appeared and entered his pleas. The offhand claim of the prosecuting attorney of a lack of knowledge of the offense appears to be without substance, and is at best a futile attempt to thwart the operation of the statutory bar (T-6).

The petitioner, having entered a plea of and having been found guilty and sentenced on three of the offenses,

is clearly entitled to the statutory bar contained in 76-1-401 (et seq.) U.C.A., 1953, as amended.

For these reasons, the petitioner respectfully requests the Court to grant his petition and issue its Order prohibiting the Circuit Court from proceeding further with the charge against him, and further ordering said Court to dismiss said charge.

RESPECTFULLY SUBMITTED this 26 day of September 1979.


L. E. RICHARDSON
Attorney for Petitioner-
Appellant
516 Boston Building
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING

I certify that on the 26 day of September 1979, I deposited in the U.S. Mail, first class, postage prepaid, two true and accurate copies of the foregoing BRIEF OF APPELLANT, addressed to: Davis County Attorney, Davis County Courthouse, Farmington, Utah 84025.

