

1979

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

JAMES H. HUPP,

Petitioner-Appellant,

-vs-

HONORABLE S. MARK JOHNSON,
Judge of the Circuit Court,
State of Utah, Davis County,
Bountiful Department,

Defendant-Respondent.

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SECOND
JUDICIAL DISTRICT COURT, IN AND FOR DAVIS
COUNTY, STATE OF UTAH, THE HONORABLE
J. DUFFY PALMER, JUDGE, PRESIDING

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
JAMES H. HUPP, :

Petitioner-Appellant, :

-vs- :

Case No.
16603

HONORABLE S. MARK JOHNSON, :
Judge of the Circuit Court, :
State of Utah, Davis County, :
Bountiful Department, :

Defendant-Respondent. :
:

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

STATEMENT OF THE NATURE OF THE CASE

Appellant petitioned the Second Judicial District Court for Davis County for an Extraordinary Writ directing respondent to dismiss a criminal complaint charging appellant with driving under the influence of intoxicating liquor in violation of Utah Code Ann. § 41-6-44 (1953), as amended.

DISPOSITION IN THE LOWER COURT

The Honorable J. Duffy Palmer, Judge of the Second Judicial District Court, heard arguments of counsel on the 19th day of July, 1979. Judge Palmer ruled that the offenses

with which appellant was charged did not constitute a single criminal episode, and thus that appellant was not entitled to the relief prayed for in the petition.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the order of Judge Palmer dismissing the appellant's petition for an Extraordinary Writ.

STATEMENT OF FACTS

Appellant was arrested on the 5th day of January, 1979, at approximately 1:50 a.m., and was charged by separate citations with four separate violations of the Motor Vehicle Code: driving under the influence of alcohol, in violation of Utah Code Ann. § 41-6-44 (1953), as amended (all statutory references are to Utah Code Ann. 1953 as amended unless otherwise indicated); operating a motor vehicle without a valid operator's license, in violation of Section 41-2-2; operating a motor vehicle with an expired Utah State vehicle registration, in violation of Section 41-6-157; and operating a motor vehicle without a valid Utah State safety inspection sticker, in violation of Section 41-6-158.

Pursuant to the requirements of Section 77-11-6, et seq., appellant appeared in the Circuit Court of Davis County, Bountiful Department, and pleaded guilty

to operating a motor vehicle without a valid Utah operator's license, operating a vehicle without a valid Utah safety inspection sticker, and operating a vehicle without a valid Utah vehicle registration. The court accepted these pleas and sentenced appellant thereupon. Appellant at that time entered a plea of not guilty to the charge of driving under the influence of alcohol and pursuant to Section 77-11-9, appellant was subsequently charged by a formal complaint with driving under the influence of alcohol.

Trial on this charge was had on May 22, 1979. Appellant appeared through counsel and moved the Court to dismiss the charge because the prosecution was barred by the single criminal episode statutes. The Court denied this motion, found appellant guilty of the charge, and set a date for sentencing. Appellant then filed a verified petition in the Second Judicial District Court in and for Davis County. The petition was denied and appellant appeals from the denial.

ARGUMENT

POINT I

THE APPELLANT'S CONDUCT DID NOT
CONSTITUTE A "SINGLE CRIMINAL EPISODE"
WITHIN THE MEANING OF UTAH CODE ANN.
§ 76-1-401 (1953), AS AMENDED.

The concept of "single criminal episode" is defined in Section 76-1-401 as follows:

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Respondent concedes that the conduct of appellant giving rise to the charges against appellant was "closely related in time." However, there was no "single criminal objective" on appellant's behalf to which such conduct was incident. The case of State v. Cornish, 571 P.2d 577 (Utah 1977), sheds significant light on the meaning of "single criminal objective." In Cornish, the defendant was charged with unlawful taking of a motor vehicle and with failure to stop at the command of a peace officer. This Court stated, in finding that the conduct did not constitute a single criminal episode:

Not only were the two offenses charged separated in time by approximately one full day, but they also were separate in objective. The objective of the unlawful taking was to obtain possession, be it permanent or temporary, of another's automobile. It was a completed offense at the time the car was taken. The objective of the failure to stop was to avoid arrest for the traffic violations he had just committed and/or to avoid being found in a stolen motor vehicle.

571 P.2d 577, 578.

Respondent submits that in the case at bar it makes no sense to speak of appellant's "criminal objective" which his conduct (i.e., driving) was intended to accomplish. The offenses with which appellant was charged are all strict liability offenses, which require no particular intent or state of mind. If the actor commits the forbidden "act" he is guilty under the statutes. Such offenses are not aimed at controlling "criminal objective," but only at controlling prohibited actions.

In an attempt to bring his case within Section 76-1-401, appellant argues that his "single criminal objective" was "to perform the act of driving a vehicle illegally," Appellant's Brief, p. 4. Common experience would indicate that even a person who drives a vehicle without a valid registration, license, or inspection and while under the influence of alcohol does not necessarily form a conscious objective to violate the law by so driving. Even assuming that one did form this "objective," the conduct of becoming intoxicated was not "incident to an attempt or an accomplishment" of the objective (i.e., driving a vehicle illegally). Appellant's intoxication was not a necessary precondition to his driving illegally in the sense that kidnapping may be a necessary incident

to the accomplishment of robbery. Thus, appellant's conduct did not constitute a single criminal episode as defined in Section 76-1-401.

Appellant's conduct is not the type to which the single criminal episode statutes are designed to apply. In Model Penal Code § 1.08, Comment (Proposed Official Draft 1962), the commentator states:

Paragraph (b) requires a single prosecution for offenses arising out of conduct engaged in with a common purpose where the offenses are all necessary or incidental to the accomplishment of that purpose. In many instances one offense is a necessary step in the accomplishment of a given criminal objective. . . Fairly frequent are prosecutions for robbery and kidnapping where the kidnapping was necessary to accomplish the robbery.

Given this example, appellant's characterization of driving illegally as his "single criminal objective" is unsound and constitutes merely a strained attempt to bring himself under the protection of the statutes.

POINT II

EVEN IF APPELLANT'S CONDUCT WAS A "SINGLE CRIMINAL EPISODE," THE PROCEDURE FOLLOWED IN THIS CASE DID NOT VIOLATE UTAH CODE ANN. § 76-1-401, ET SEQ. (1953), AS AMENDED.

The operative provisions of the single criminal episode statutes are set out in relevant part below:

(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.

(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.

(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:

(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

(b) The former prosecution:

(i) Resulted in acquittal; or

(ii) Resulted in conviction; or

(iii) Was improperly terminated; or

(iv) Was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution. . .

(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 and that is capable of supporting a judgment; or a plea of guilty accepted by the court.

Sections 76-1-402 and 76-1-403, Utah Code Ann.,
(1953), as amended (emphasis added). In the case of State v.
Sosa, filed July 5, 1979, No. 15929, this Court wrote:

The single criminal episode statute is strictly procedural in nature. It requires that when a defendant is brought before a court, all offenses arising from a single incident which are triable before that court should be charged at the same time. If separate charges can be joined, they should be.

Id. at p. 4. Respondent submits that in the case at bar, even if appellant's conduct constitutes a single criminal episode under § 76-1-401, the above-stated requirement was met and thus the ruling of Judge Palmer should be affirmed.

Under § 76-1-402(1), if the "same act" of a defendant may be punished in different ways under different provisions of the Code, defendant may be punished under only one such provision. This subsection does not apply to the case at bar because the only "act" which is common to each offense for which appellant was charged is that of operating a motor vehicle. This act alone is not prohibited by any section of the code and thus is not punishable in different ways. Only if "act" is defined to include, in addition to driving, the further acts of being intoxicated, or failing to have a valid driver's license, registration, or vehicle inspection, does the provision make sense. In this light, it was not

the "same act" of appellant for which he was charged with four distinct offenses, but rather four distinct "acts" which constitute four distinct offenses.

Under § 76-1-402(2), a defendant whose conduct establishes separate offenses should not, unless the judge otherwise orders, be subject to separate trials. This provision does not apply to the instant case because appellant was not subjected to "separate trials." The procedure for disposition of citation offenses is set out in the following sections:

A peace officer, in lieu of taking a person into custody . . . may issue and deliver a citation requiring any person subject to arrest or prosecution on a misdemeanor charge to appear at the court of the magistrate before whom the person could be taken pursuant to law if the person had been arrested.

§ 77-11-6 (emphasis added); and:

(1) Whenever a citation is issued pursuant to the provisions of section 77-11-6, the copy of the citation filed with the magistrate may be used in lieu of a complaint to which the person cited may plead guilty or on which bail may be posted and forfeited.

(2) If the person cited wilfully fails to appear before a magistrate pursuant to a citation issued under section 77-11-6 or pleads not guilty to the offense charged . . . a complaint

shall be filed and proceedings
held in accordance with the Rules of
Criminal Procedure . . .

§ 77-11-9 (emphasis added). The procedure set forth above was strictly followed in this case. Appellant pleaded guilty to the three violations of driving without a license, registration, or vehicle inspection and entered a plea of not guilty to the charge of driving under the influence of intoxicating liquor. A complaint was then filed and a time set for the trial of the charge to which appellant pleaded not guilty. This procedure did not constitute two "separate trials," but rather a series of events leading to one trial on the driving under the influence charge. To hold otherwise would create a conflict between § 77-11-9 and the single criminal episode statutes since any time a defendant was charged with multiple citation offenses he could plead guilty to one or more offenses and not guilty to the others and avoid subsequent proceedings on those charges to which he pleaded not guilty by arguing the statutory bar of § 76-1-402.

Section 76-1-403(1) bars a subsequent prosecution for offenses which were or should have been (under § 76-1-402) prosecuted in a former prosecution. For the reasons stated above, it makes no sense to speak of (1) the accepting of guilty pleas on some charges, and (2) the trial of other charges to which appellant pleaded not guilty, as separate "prosecutions."

The procedure set forth in § 77-11-9, *infra*, is, when followed, only one prosecution leading to one trial. Thus, § 76-1-403 does not apply here.

Finally, appellant suggests that the judge should not have accepted appellant's pleas of not guilty until after the trial on the charge of driving under the influence. The danger in this contention is shown by the following illustration. Most citation offenses are disposed of by the defendant's mailing the appropriate fine directly to the Circuit Court Clerk's Office. Such a procedure is equivalent to a plea of guilty to the offense charged which is automatically accepted by the court. The fine (sentence) is pre-set according to the bail schedule. If appellant had chosen to mail the fines for the three offenses to which he pleaded guilty and then appear to plead not guilty to driving under the influence, he would, under the theory he advances here, not be subject to prosecution on the latter charge. This result would follow even though no judge had accepted appellant's guilty pleas. This shows that appellant's argument that his case fits within the single criminal episode statutes is unfounded.

CONCLUSION

Respondent submits that the order dismissing petitioner's petition for an Extraordinary Writ be affirmed for the following reasons. First, where as here, a defendant is charged by citation with multiple violations of the Utah Code and where each of the offenses is a "strict-liability" crime, the single criminal episode statutes do not apply because there is no "single criminal episode" as that phrase is intended. Second, even if conduct such as appellant's constitutes a "single criminal episode," the words "same act" under § 76-1-402 must be interpreted to include not merely the act of driving, but also the acts or omissions of becoming intoxicated, and failing to obtain a valid driver's license, registration, or vehicle inspection. Appellant committed four separate "acts" punishable in four different ways under the Code.

Finally, the procedure following in cases such as this does not subject a defendant to multiple prosecutions for charges which could have been disposed of in one prosecution. Rather, the acceptance of guilty pleas on some charges and subsequent trial on other charges to which the defendant pleaded not guilty constitutes one prosecution within the mandate of § 76-1-403.

Respectfully submitted,

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