

1980

State of Utah v. Delbert Dean Loddy : Brief of Appellants

Utah Supreme Court

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THE STATE OF UTAH,
Plaintiff-Appellant,
vs.
DELBERT DEAN LODDY,
Defendant-Respondent.

CASE NO. ~~16885~~ 16855

Appeal from the Order of the District Court of
the Third Judicial District in and for
Tooele County, State of Utah
David B. Dee, District Judge Presiding

RONALD L. ELTON, Tooele County
Attorney and H. WAYNE GREEN,
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Attorneys for Plaintiff-Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,)
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Plaintiff-Appellant,)
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vs.)
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BRIEF OF APPELLANTS

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

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* * * * *

BRIEF OF APPELLANT

The State of Utah

STATEMENT OF THE NATURE OF THE CASE

This case is a criminal prosecution which was initiated in Tooele County and had proceeded through preliminary examination in the Sixth Circuit Court and was pending for trial in the Third District Court in and for Tooele County on an Information filed by the Tooele County Attorney, charging the defendant with Theft, a Felony of the Second Degree in violation of Title 76, Chapter 6, Section 404, Utah Code Annotated, 1953, as amended. The incident giving rise to the prosecution occurred on September 29, 1975 near Delle in Tooele County.

DISPOSITION IN THE DISTRICT COURT

Defendant filed a Motion to Dismiss which was heard before the Third District Court in and for Tooele County with

David B. Dee, District Judge presiding on December 13, 1979. After hearing arguments on the Motion to Dismiss the Court made its Order granting defendant's motion and dismissing the Information with prejudice.

RELIEF SOUGHT ON APPEAL

Pursuant to its right to appeal granted by Section 77-39-4 (9), appellant requests that the Order of Dismissal be reversed and the Information be reinstated.

STATEMENT OF FACTS

On September 29, 1975 an incident involving a theft of copper wire belonging to Mountain Bell Telephone Co., occurred near Delle in Tooele County. On September 30, 1975 William Warren Holton was arrested and charged in a Complaint filed in Tooele City Court with the commission of the theft. On April 11, 1978, after a series of continuances, some of which occurred because Mr. Holton failed to appear and his whereabouts were unknown, Mr. Holton appeared in the Sixth Circuit Court for a preliminary examination. Pursuant to a negotiated plea, the State moved to amend the Complaint to charge Attempted Theft, a Felony of the Third Degree. This Motion was granted and Mr. Holton was bound over to appear in District Court that same day. Mr. Holton appeared in District Court and entered a plea of guilty to the Information filed charging him with Attempted Theft, a Third Degree Felony. On April 13, 1978 Mr. Holton gave a statement to the Tooele County Sheriff in which he implicated the defendant

herein, Delbert Dean Loddy, in the offense which had occurred on September 29, 1975. After the statement was transcribed, a Complaint was filed in the Tooele City Court on June 15, 1978 charging Delbert Dean Loddy with the theft which had occurred on September 29, 1975 and a warrant for Mr. Loddy's arrest was issued. Mr. Loddy was arrested in Wyoming in June, 1979 and waived extradition from Campbell County, Wyoming on June 22, 1979. From that date on, there were a number of delays and continuances of the trial, all at the defendant's request, until the date the Motion to Dismiss was heard and the Order of Dismissal was entered, which resulted in this appeal.

ISSUES PRESENTED

1. Whether the Order dismissing the Information with prejudice set forth the reasons therefore with sufficient specificity?
2. Whether the defendant's right to Due Process of Law under the 14th Amendment to the United States Constitution has been violated?

ARGUMENT

POINT I

THE ORDER OF THE DISTRICT COURT DISMISSING
THE INFORMATION WITH PREJUDICE DID NOT SET
FORTH THE REASONS FOR THE DISMISSAL WITH
SUFFICIENT SPECIFICITY

In this case after listening to the arguments of counsel the District Court Judge made the following order; " Well, there's a question of delay within delay. In any event the

Court having heard the Motion, arguments and reviewed the file makes a determination. The Motion to Dismiss is granted with prejudice." (Transcript of Hearing on Motion to Dismiss, pages 10-11). In the written Order of Dismissal, which the District Judge signed, the following language appears, "Based upon the pleadings and documents in the file and the Affidavit of Robert Van Sciver and the Court having heard the arguments of counsel, it is hereby ordered that the Information in the above entitled case be and hereby is dismissed with prejudice." (Order of Dismissal).

Section 77-51-4, U.C.A., 1953, as amended, provides:

The Court may, either of its own motion or upon the application of the County Attorney, in furtherance of justice order an action, information or indictment to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes.

In Salt Lake City v. Hanson, 19 Utah 2d 32, 425 P. 2d 773, the Supreme Court of Utah considered the question of whether or not a District Court Judge acted properly in dismissing seven cases which had been appealed from City Court to District Court. The Orders of Dismissal contained no statement of the reason for dismissal. In considering this issue the Court referred to Section 77-51-4 Utah Code Annotated. The Court held:

"Because of the nature of criminal proceedings, and because they are in the interest of and for the protection of the public, there is a sound basis

in public policy for requiring the judge who assumes the serious responsibility of dismissing a case to set forth his reasons for doing so in order that all may know what invokes the Court's discretion and whether its action is justified."

The Court reversed the District Court's Order of Dimissal. Hanson, supra at 35 and 775. The Court cited a California case, People v. Winters, 342 P2d 538 as authority for the above stated proposition. The Winters case involved a situation where a Municipal Court Judge in Los Angeles on his own motion and in the interest of justice, dismissed ten prosecutions for gambling initiated by the State of California. On appeal, the Superior Court Appellate Department reversed the dismissals. The Court cited California Penal Code Section 1385 which is very similar to Section 77-51-4 U.C.A. In speaking of that section the Court said:

"Penal Code Section 1385 requires that the minute order must set forth the reasons for dismissal. We have not authority to disregard this requirement or to hold that it is merely directory."

The Court further stated:

"As was said in People v. Disperati, . . . It is to be observed that this is no "technical" objection to the proceedings, as the term technical is commonly understood, but it relates to an important rule of procedure which the Legislature has provided for the guidance of the Courts, and the omission to observe it cannot be held to be innocuous without an invasion of the authority of a co-ordinate branch of the government. If the practice of which complaint is made is to be continued, it is manifest that great abuse is likely to follow, more dangerous to society than even the acquittal of the guilty.

A judge dismissing criminal charges without trial, upon his own motion, must record his reasons so that all may know why this great power was exercised, and such public declaration is indeed a purposeful restraint, lest magistial discretion sweep away the government of laws." Winters supra at 542.

In the present case the Court did not specify the reasons for dismissal either in its order as spoken from the bench or in the written order which it signed. Nor is a reason for the dismissal given in the minute entry. It is submitted therefore, that the Court erred in not following the procedure set by the legislature, which must be followed.

POINT II

THE APPLICABLE FOUR YEAR STATUTE OF LIMITATIONS HAD NOT EXPIRED

The facts of this case are that the criminal charges which were filed against the defendant, were filed before the statute of limitations had expired. The incident giving rise to the charge occurred on September 29, 1975. The charge of Theft, a Felony of the Second Degree, was filed on June 15, 1978, some two years and nine months later and well within the applicable four year statute of limitations provided by Section 76-1-302 U.C.A.

Section 76-1-304 U.C.A., 1953 as amended, provides that:

"The period of limitations does not run against any defendant during any period of time he is out of the State following the commission of an offense."

In his Memorandum in Opposition to Summary Disposition, counsel for defense points out that the defendant was outside of the State of Utah from February 19, 1977 to December 18, 1977, a period of ten months. It is also stated that from March of 1978 up until the time of his arrest, Mr. Loddy was living in Colorado and then Wyoming. The defendant was

therefore out of the State of Utah for 13 of the 33 months which expired between the date of the incident and the filing of the complaint.

When the time during which the defendant was outside of the State of Utah is accounted for, only 20 months of the applicable four year limitation period had expired and 28 more months remained before the statute of limitations would have expired.

POINT III

THE DEFENSE DID NOT PRODUCE EVIDENCE
AT THE HEARING ON THE MOTION TO DISMISS
WHICH WOULD ESTABLISH A VIOLATION OF
HIS RIGHT TO A SPEEDY TRIAL OR HIS
14th AMENDMENT RIGHT TO DUE PROCESS
OF LAW

At the hearing on the defendant's motion to dismiss, the defense asserted as the basis for the motion that the defendant's right to due process of law had been violated by the delay between the date the incident occurred and the date the complaint was filed. In his Memorandum in Opposition to Summary Disposition, defense counsel also raised the issue of a denial of the defendants right to a speedy trial as guaranteed by the Sixth Amendment and Section 77-1-8 (6) U.C.A. It is the position of the State that neither of these claims are valid in this case.

With respect to the argument that the defendant has been denied a speedy trial, the law is clear that that right does not apply until one becomes an "accused". The case United States v. Marion, 404 U.S. 307, 30 LEd 2d 468, 92

S. Ct. 455, the United States Supreme Court declined to extend the reach of the Sixth Amendment's guarantee of a speedy trial to the period prior to arrest. The case is very illustrative of the type of problem dealt with in this case.

In Marion, the facts were as follows: The defendants-appellees were indicted on April 21, 1970 on 19 counts alleging that their business known as Allied Enterprises, Inc. had been fraudulently conducted and involved misrepresentations, alteration of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 1967; with the earliest specific act allegedly occurring on September 3, 1965 and the latest on January 19, 1966. The appellees filed a motion to dismiss the indictment,

"for failure to commence prosecution of the alleged offenses charged therein within such time as to afford them (their rights) to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States." Marion, supra at 404 U.S. 309, 30 LE2d 472.

No evidence was submitted, but the Court noted that from the motion and the arguments of counsel it appeared that Allied had been subject to a Federal Trade Commission cease-and-desist order since February 6, 1967 and that the U.S. Attorney's office was investigating Allied and other firms by October of that same year. The U.S. Attorney's office requested certain Allied records, which were delivered in the summer of 1968. The Grand Jury by which the appellees were indicted was impaneled in September of 1969 and appellees were informed

of the Grand Jury's concern with them in March of 1970. The indictment was then handed down in April of 1970. The appellants moved to dismiss on grounds that the indictment was returned an unreasonably oppressive and unjustifiable time after the alleged offenses. They argued that the indictment required them to remember specific acts and conversations which occurred several years before. They also argued that the delay was due to the indifference or negligence of the U. S. Attorney in investigating the case and presenting it to a Grand Jury. The Court noted that no specific prejudice was claimed or demonstrated. The District Court dismissed the indictment for lack of speedy prosecution and remarked that the defense or the case must have been seriously prejudiced by the delay of at least three years in bringing the prosecution. On appeal the United States Supreme Court reversed the dismissal and addressed the Sixth Amendment speedy trial issue and the Fifth Amendment due process issue.

With respect to the issue of whether or not the delay in initiating the prosecution violated the appellees Sixth Amendment right to a speedy trial the Court held that it did not. The Court said:

"The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. Those provisions would seem to afford no protection to those not yet accused, nor would they

The Due Process reasoning of the Supreme Court is applicable to this case even though this case involves the Due Process clause of the Fourteenth Amendment whereas the Marion case dealt with the Due Process clause of the Fifth Amendment. Hibben v. Smith, 191 U.S. 310, 48 LEd 195, 24 S. Ct. 88.

In the case before the Court the defense alleges a violation of the defendant's Due Process rights. At the hearing on the Motion to Dismiss, the only evidence presented was Mr. Van Scive's Affidavit. There was no evidence presented which in any way demonstrated that Mr. Loddy had been prejudiced in his ability to present a defense. There was no evidence presented which demonstrated an intentional delay by the State for the purpose of gaining a tactical advantage. There was no evidence presented which would indicate that the State had any intent to file charges against the defendant until after the statement was obtained from Mr. Holton in 1978. The distinction must be drawn between the passage of time and delaying by the State. The Marion case dealt with preaccusation delay by the government. Webster defines delay as follows:

"... 1. to put off to a future time; postpone. 2. to make late; slow up; detain -- vi. to stop for a while; linger..." Webster's New World Dictionary, Second College Edition, 1974, pp. 372.

The word delay, as can be seen, connotes some kind of intent. In the Marion case, the Court spoke in terms of intentionally delaying to gain some tactical advantage. Marion, supra 404 U.S. at 325, 30 LEd 2d at 481-82. The record

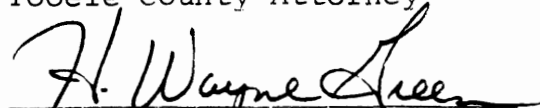
here does not demonstrate that the State delayed. What it does show is that there was a passage of time between the incident and the filing of the complaint. Nor does the record show that the State allowed the time to pass in order to gain a tactical advantage over the defendant or to harass him. In short, the defense has not demonstrated either prejudice to their ability to defend or a intentional delay by the State to gain a tactical advantage over the defendant. There was therefore, no basis for the Information to be dismissed.

CONCLUSION

A review of the record in this case demonstrates that there was error committed by the District Court on the points presented. The District Court did not follow the mandate of Section 77-51-4 and state its reasons for dismissing the case in its order, on the record or in the minutes. Nor was there any showing by the defense of facts which would justify the dismissal of the case. Neither the defendant's Sixth Amendment right to a speedy trial or his Fourteenth Amendment right to due process of law have been violated by the passage of time in this case. The prosecution was instituted much before the applicable statute of limitations had expired.

RESPECTFULLY SUBMITTED this 11th day of April, 1980.


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CERTIFICATE OF MAILING

I hereby certify that two (2) copies of this brief were mailed to Robert Van Sciver, Attorney at Law, 321 South 600 East, Salt Lake City, Utah 84102, on this 11th day of April, 1980.

Tina Coates
TINA COATES, Secretary