

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Appellant, :

vs. : Case No. ~~46885~~-10855

DELBERT DEAN LODDY, :

Defendant-Respondent. :

BRIEF OF RESPONDENT

Appeal from an order by the Honorable Judge David B. Dee in the Third Judicial District in and for Tooele County, State of Utah, dismissing the charge against the respondent of theft, a second degree felony.

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RELIEF SOUGHT ON APPEAL

Respondent seeks to have this Court affirm the order of the lower court.

STATEMENT OF FACTS

On September 29, 1975, an incident occurred in Tooele County which lead investigating authorities to believe that a theft of Mountain Bell wire had taken place. The following day, one William Holton was arrested on a charge of "grand larceny," (R-24-26,36). His attorney contacted the then deputy county attorney for Tooele County and was advised that no charges would be filed against the respondent because there was not sufficient evidence to prosecute him, (R-53).

Although no such facts appear in the record of this case to support its allegations, the appellant has claimed that on September 30, 1975, a complaint was filed against Holton, charging him with theft, (appellant's brief, p.2). The appellant also alleges that after a series of continuances, Holton waived his right to a preliminary examination, entered a plea of guilty to a lesser offense, and as part of plea negotiations agreed to give a statement implicating the respondent in the purported theft, (id.). On the basis of that statement, according to the appellant, a complaint was issued on July 11, 1978, three months after the statement was given, and a warrant of arrest was issued, (R-5 and R-6).

The respondent was arrested in Wyoming on June 22, 1979.

The appellant has not contested the fact that for a portion of the time between the September 29, 1975 incident and the arrest on June 22, 1979, the respondent resided outside of Utah, (appellant's brief, p.6). The appellant has also conceded that during part of the time he was a non-resident the respondent was incarcerated, (T-7).

The respondent made a motion to dismiss the charge against him on the ground that the state unreasonably delayed in bringing his prosecution to trial, (R-55). At the time the motion was made, the whereabouts of Holton, the principal witness against the respondent, were unknown (R-40). After a hearing, the court granted the motion, (T-11). Although the appellant's brief makes reference to a minute order granting the motion, (appellant's brief, p.6), none appears in the record filed with this Court. The written order of dismissal signed by the court was prepared by the Tooele County Attorney, (R-inside cover).

A R G U M E N T

POINT I

THE TOOELE COUNTY ATTORNEY LACKS AUTHORITY TO BRING THIS APPEAL.

The powers of the county attorneys in the State of Utah are those prescribed by law, Art. VIII, Sec. 10, Constitution of Utah. The legislature enumerated and described those powers in Section 17-18-1, (all statutory references are to Utah Code Annotated unless otherwise noted). Nowhere in that section was

the power given to county attorneys to prosecute appeals in the Utah Supreme Court.

The power of the county attorney to appear in the Supreme Court is limited to rendering, "... such assistance as may be required by the attorney general in all such cases that may be appealed to the Supreme Court," Section 17-18-1 (3). The primary responsibility for prosecuting appeals in the Supreme Court would appear to be with the attorney general. It is his duty, "[t]o attend the Supreme Court of this state ... and prosecute or defend all causes to which the state ... is a party;" Section 67-5-1(1).

In the present case, the Tooele County Attorney has exceeded the bounds of its statutory authority. It has not been "required by the attorney general to give assistance," in this appeal, rather, it has usurped the statutory function of the attorney general by filing a brief in this Court. The New Mexico Supreme Court was presented with a similar problem in State v. Aragon, 55 N.M. 431, 234 P.2d 356 (1950).

At the time of the Aragon decision, New Mexico had a statute which, like Section 67-5-1 (1), provided that the attorney general should have prosecuted and defended all cases in the Supreme Court, Section 3-302 in Laws of New Mexico, 1941 Compilation. The New Mexico Supreme Court accepted the respondent's contention that the duty to "prosecute" included taking an appeal and in response to the respondent's challenge to the

authority of a district attorney to take an appeal, held "... the District Attorney had the authority to take the appeal but ... it is the prerogative and duty of the Attorney General to brief the case and present it in this court, and a District Attorney may only appear here in a criminal case by permission of the Attorney General and in association with him.... The motion to strike the brief of the District Attorney will be granted," 234 P.2d 356,358.

This Court should adopt the ruling of the New Mexico Supreme Court and dismiss the brief filed by the Tooele County Attorney. If it does not, the result will encourage other county attorneys to prosecute appeals of their own and, consequently could result in as many different approaches to one question of law as there are county attorneys. The consolidation of the power to appear in the Supreme Court in one office, the attorney general, hopefully would lend more consistency to the appellate process.

POINT II

THE DISTRICT COURT ACTED WITHIN THE SCOPE OF ITS DISCRETION IN DISMISSING THE CHARGE.

Under Section 77-51-4, a trial court of this state, "... may ... of its own motion ... in furtherance of justice order an action, information or indictment to be dismissed." Respondent sought to have the lower court invoke its power by making a motion to dismiss for undue delay on the part of the

prosecution. It is his contention that the lower court properly exercised its discretion in dismissing the case.

After the alleged theft and the filing of a complaint against Holton, some three years passed before his ostensible confession which implicated the respondent. Inexplicably, with the case "resolved" against Holton, another three months passed before a complaint and arrest warrant for the respondent issued. In the interim, the respondent had taken up living in Wyoming. Another year passed and he was arrested there to face a four year-old case which, according to the appellant, could not have been filed prior to Holton's confession, (appellant's brief, p.12). Yet, as trial approached the appellant was unaware of Holton's whereabouts. Without Holton's presence, his confession implicating the respondent would be inadmissible under Rule 63, Utah Rules of Evidence, and Bruton v. United States, 391 U. S. 123 (1968). If Holton was somehow to have been produced for a trial, his testimony as an accomplice, under the law in effect at the time of the offense, would have required corroboration. In addition to these factors, the court was required to weigh the expense in time and money to the parties if this litigation was to continue as well as the propriety of consuming scarce judicial resources with a case of this age and nature. While there may be those who would disagree with the lower court's decision, a fair consideration of the preceding factors could hardly lead to the conclusion that its decision

was an abuse of discretion.

Appellant nevertheless argues that because the court failed to specify its reasons for the dismissal in its order, the order should be dismissed, and Salt Lake City v. Hanson, 19 U. 2d 32, 425 P.2d 773 (1967) is cited as support for that proposition. This contention contains two fatal flaws.

The order in this case was prepared by the appellant and it is now the appellant who seeks to attack the very order it prepared. It would seem ludicrous to permit the appellant to complain of defects in the order. This court should apply a construction to the order similar to what it would apply if it was a contract, that "language in a written instrument is interpreted more strongly against a scrivener who executes it, Skousen v. Smith, 27 U.2d 169, 493 P.2d 1003 (1972). The appellant, having chosen to prepare the order, should now be estopped from attacking it. A contrary decision would permit any disgruntled party to bring a successful appeal through the procedural artifice of filing a flawed order.

If the Court permits the appellant to assail the order, it nevertheless should be sustained because the reasons it was granted are clear. Salt Lake City v. Hanson is cited by the appellant as authority for the proposition that unless the judge granting an order of dismissal specifies the reasons for the dismissal his order is improper. Hanson does not apply to the present case. In Hanson, although the Court disapproved

the lower court's entry of an order of dismissal without specifying its reasons, the Supreme Court did not appear to reverse the lower court on that grounds. Rather, the Court fully discussed the two reasons orally advanced by the lower court for its order and found them to be insufficient justifications for a dismissal. Further, the concurring opinion of Justice Ellett in the Hanson case at 425 P.2d 776, discloses another factor distinguishing it from this appeal. There the trial judge is quoted as saying upon entering the order of dismissal that he is about to give someone "the shock of their life." Where no warning is given it would be a benefit to both parties to know the reasons for the dismissal.

This appeal sharply contrasts with the Hanson case. Here no one received the "shock of their life." The reasons for which the respondent sought to have the lower court invoke its discretion to dismiss the case were spelled out in writing in specific detail and were reiterated at the hearing on the motion to dismiss the case. The rule is that, "an order will not be contrued as going beyond the motion in pursuance of which it is given," Attorney General of Utah v. Pomeroy, 73 P.2d 1277 (Utah 1937). Thus, although the appellant chose not to state the reasons for the dismissal in the order it prepared for the court's signature, there is no great mystery as to why the order was granted. It was granted for the reasons suggested

by the respondent in his motion and argument. Under the Pomeroy rule, those are the only reasons the order could have been based upon. Therefore, the concern of the Hanson case, that, "the judge who assumes the serious responsibility of dismissing a case [be required] 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," 425 P.2d 773, 775, has been met. The reasons for the invocation of the court's discretion are clear. The order should be upheld.

POINT III

RESPONDENT'S RIGHT TO DUE PROCESS MANDATES A DISMISSAL OF THIS CASE.

If this Court concludes that the lower court judge acted beyond the bounds of his discretion in dismissing the charges in the interests of justice under Section 77-51-4, it nevertheless should affirm the dismissal because permitting the prosecution to proceed would violate the respondent's constitutional rights to due process of law.

In United State v. Marion, 404 U.S. 307 (1971), it was held that the constitutional right to a speedy trial does not take effect until an accusation or arrest has been made. However, it was also said that if an accused could show actual prejudice resulting from a delay between the alleged offense and his arrest, the trial court in the exercise of its discre-

tion, could dismiss the prosecution on due process grounds. In the present case, the actual prejudice to the defendant is apparent.

As noted, four years passed between the alleged incident and respondent's arrest. He had been told no charges would be filed against him, consequently no effort was made to locate witnesses in his behalf. He has no idea where his alleged accomplice turned accuser is located so his attorneys cannot interview him. If the Tooele County Attorney had timely filed its case it would now be long over. Further, if it had filed the case during or before the time the respondent was incarcerated, he could have and would have demanded the disposition of the charges pursuant to Section 77-65-4, U.C.A. (1953). Appellant's delay in filing deprived him of his right to a disposition.

The actual prejudice to the respondent from the delay in charging him is readily apparent. The lower court's dismissal was an appropriate recognition of his right to due process.

CONCLUSION

The Court should consider striking the brief filed by the Tooele County Attorney because he has exceeded his authority in taking that action. If it does not do so, it should affirm the lower court's order dismissing the prosecution as a proper

exercise of that court's discretion.

DATED this 30th day of May, 1980.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the above and foregoing Brief of Respondent to the Tooele
County Attorney, Tooele County Courthouse, Tooele, Utah 84074,
this 3rd day of JUNE, 1980.

Edward K. Brass