

1981

State of Utah v. Caral Lee Owens and Rudell Owens : Brief of Respondents on Rehearing

Utah Supreme Court

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SUPREME COURT
STATE OF UTAH

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STATE OF UTAH, :
Plaintiff/Appellant, :
-vs- : Case No. 17038
CARAL LEE OWENS and RUDELL :
OWENS, :
Defendants/Respondents. :

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RESPONDENTS' BRIEF
ON REHEARING

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~~State of Museum and Library Services~~
~~Clerk, Supreme Court, Utah~~

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RESPONDENTS' BRIEF
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STATEMENT OF THE CASE

An Information based on Section 76-6-410(b) UCA, 1953, as amended, was filed against Caral Lee Owens and Rudell Owens which was subsequently quashed by the Fourth Judicial District Court on constitutional grounds. An appeal on behalf of the State was brought by the Utah County Attorney, which appeal was dismissed pursuant to State vs. Loddy, 618 P.2d 60 (Utah 1980) as having been brought without the proper authority. Appellant petitioned for rehearing, which petition has been granted.

DISPOSITION IN THE LOWER COURT

Pursuant to defendants' Motion to Quash the Information on the basis that the charging statute, Section 76-6-410(b) was unconstitutionally vague and thereby denied defendants due process of law, the Information was dismissed by order of the court. The defendants were charged and the State has sought appeal to the Supreme Court.

RELIEF SOUGHT ON APPEAL BY RESPONDENTS

Respondents submit that the appeal should be dismissed on the basis that it has been improperly taken by the Utah County Attorney's Office and not under the authority or at the request of the Utah State Attorney General. In the alternative, the respondents urge the court to hold that the charging statute, Section 76-6-410(b), UCA, 1953 and the language of such section as implemented through the Information filed in this matter is unconstitutionally vague.

ARGUMENT

POINT I

THE UTAH COUNTY ATTORNEY IMPROPERLY BROUGHT THIS APPEAL IN THE NAME OF THE STATE OF UTAH.

The issue of the County Attorney's authority to bring appeals on behalf of the State was placed squarely before this Court in the case of State vs. Loddy, supra. Therein, the Court dismissed an appeal brought by the Tooele County Attorney on a theft charge against the defendant. The dismissal was so justified:

"This appeal was taken by the Tooele county attorney in the name of the State, but the record does not disclose that he was rendering "such assistance as. . . required by the attorney general. . ." 618 P.2d at 61.

This Court came to the identical conclusion in this case:

"The Utah county attorney brings this appeal from the District Court's granting of the defendants' Motion to Quash the Information. The record reveals the appeal was exclusively taken by the county attorney in the name of the State and does not indicate that he was rendering assistance as requested by the attorney general in relation to the appeal. In our recent decision in State vs. Loddy, Utah, 618 P.2d 60 (1980), we concluded such actions to be beyond the authority of the County Attorney. Following that decision, the present appeal is dismissed."

The record sufficiently justified this court's prior decision and this court should not be asked to reconsider and reverse that decision on the basis of some off-the-record-conversation brought up merely because of the plaintiff's dissatisfaction with the initial results. This is contrary to the purpose of a petition for rehearing as outlined in Cummings vs. Nielson, 42 Utah 157, 129 P. 619 (1913), and contrary to plaintiff's assertions the Court's decision was inadequately justified by the record and not based upon some misconception of fact. The court has already been fully briefed on this issue (see Respondents' Brief on Appeal, Point I) and the petitioner has failed to raise any issue supported by the record.

According to the record, the attorney general was brought in by the Utah County Attorney contrary to the procedure required by the Court in the Loddy, supra, decision. The original dismissal of the appeal was based upon the record, and accordingly, this appeal should again be dismissed.

POINT II

"GROSS DEVIATION" IS UNCONSTITUTIONALLY VAGUE AS A PERAMETER DEFINING ILLEGAL CONDUCT.

The Court is respectfully referred to respondents' original brief on appeal for an exhaustive treatment of this argument. The primary fact of which the Court should be cognizant is that outside of a few lower courts in Oregon, no courts have confronted the constitutionality of the language here before the Court;

"A person is guilty of theft if: . . . (b) having custody of any property pursuant to a rental or lease agreement where it is to be returned in a specified manner or at a specified

time, intentionally fails to comply with the terms of the agreement concerning return so as to render such failure a gross deviation from the agreement." (Emphasis added) Section 76-6-410(b), UCA, 1978.

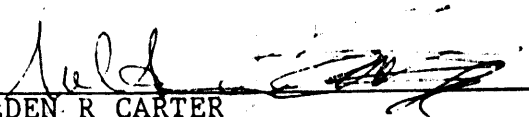
The nearly identical language of the Oregon statute was held unconstitutional by the Multnomah County Circuit Court in Portland. However, on appeal, the Oregon Court of Appeals disagreed without opinion. State vs. Boyd, 28 Or.App. 725, 560 P.2d 689, (1977). The Supreme Court of that state never heard the case and the only authority in favor of the constitutionality of this language is a five-word statement by an Oregon intermediate court.

The appellant relies heavily upon the State Legislature's use of the phrase "gross deviation" in negligence statutes. However, the conduct here proscribed is intentional conduct and the specific intentional acts to be proscribed by the statute are simply too unclear to give one the necessary notice attendant under the due process clauses under the State and Federal Constitutions.

CONCLUSION

This Court has already been supplied with ample authority for the respondents' contentions in the respondents' original brief to the Court on this appeal. The petitioner has raised no new issues and has only argued some doubtful facts which are off the record. Therefore, the respondents respectfully submit that this appeal be dismissed on the grounds cited above and as previously briefed to the Court.

DATED this _____ day of May, 1981.


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MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing to the Utah County Attorney's Office, 51 South University, Provo, Utah, 84601, postage prepaid this 22nd day of May, 1981.

