

1999

Utah v. Stephen E. Russell : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Sirena M. Wissler; Salt Lake County Deputy Attorney; attorney for appellee.

Michael L. Humiston; attorney for appellant.

Recommended Citation

Brief of Appellant, *Utah v. Stephen E. Russell*, No. 990846 (Utah Court of Appeals, 1999).

https://digitalcommons.law.byu.edu/byu_ca2/2364

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

vs.

STEPHEN E. RUSSELL,
Defendant/Appellant

:

:

:

:

Case No. 990846-CA

Case Priority: 2 (Defendant Not Incarcerated)

BRIEF OF APPELLANT

Appeal

from a pretrial ruling and jury verdict entered in
The Third District Court in and for
Salt Lake County, Murray Department
Hon. Joseph C. Fratto, presiding

Attorney for Appellee:

Sirena M. Wissler
Salt Lake County Deputy Attorney
2001 South State Street, S3400
Salt Lake City, Utah 84190
Tel: (801) 468-3422

Attorney for Appellant:

Michael L. Humiston
23 West Center Street
P.O. Box 486
Heber City, UT 84032
Tel: (435) 654-1152

TABLE OF CONTENTS

Table of Cases and Authorities	.	.	.	.	.	.	.	ii
Statement of Jurisdiction	.	.	.	.	.	.	.	1
Issues Presented for Review	.	.	.	.	.	.	.	1
Controlling Statutes	.	.	.	.	.	.	.	1
Statement of the Case	.	.	.	.	.	.	.	2
Summary of Arguments	.	.	.	.	.	.	.	2
Argument: The trial court erred in denying Appellant's Motion to Dismiss for Lack of Speedy Trial	.	.	.	.	.	.	.	3
Conclusion	.	.	.	.	.	.	.	6
Certificate of Service	.	.	.	.	.	.	.	7

TABLE OF CASES AND AUTHORITIES

<u>Barker v. Wingo</u> , 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)	.	.	3, 4, 5
<u>Dogget v. U.S.</u> , 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)	.	.	5 8
<u>State v. Banner</u> , 717 P.2d 1325 (Utah 1986)	.	.	5, 6
<u>State v. Byrns</u> , 911 P.2d 981 (Ut.App. 1995)	.	.	6
<u>State v. Hoyt</u> , 806 P.2d 204 (Ut.App. 1991)	.	.	4, 5
<u>State v. Knill</u> , 656 P.2d 1026 (Utah 1982)	.	.	4
<u>State v. Snyder</u> , 932 P.2d 120 (Ut.App. 1997)	.	.	4
<u>State v. Velasquez</u> , 641 P.2d 115 (Utah 1982)	.	.	3
<u>State v. Woodland</u> , 945 P.2d 665 (Utah 1997)	.	.	3
<u>Utah Department of Human Services ex rel. Parker v. Irizarry</u> , 945 P.2d 676			
(Utah 1997)	.	.	1

STATEMENT OF JURISDICTION

Jurisdiction of this matter is pursuant to U.C.A. §78-2a-3, which states in pertinent part:

(2) The Court of Appeals has appellate jurisdiction over:

(e) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony.

ISSUE PRESENTED FOR REVIEW

Did the trial judge err in denying Appellant's motion to dismiss for lack of speedy trial? This is a mixed question of law and fact. The standard of review is clear error as to the facts and correctness as to the law, and the appellate court may grant considerable deference to the trial courts application of the law to the facts. Utah Department of Human Services ex rel. Parker v. Irizarry, 945 P.2d 676 (Utah 1997).

CONTROLLING STATUTES

Utah Code (1953, as amended), Sections 76-2-401(1):

Conduct which is justified is a defense to prosecution for any offense based on the conduct. The defense of justification may be claimed:

(1) When the actor's conduct is in defense of persons or property under the circumstances described in Sections 76-2-402 through 76-2-406 of this part;

Utah Code (1953, as amended), Sections 76-2-402(1)(pertinent part):

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third person against such other's imminent use of unlawful force.

Amendment VI, United States Constitution (pertinent part):

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Article I, Section 12, Utah Constitution (pertinent part):

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

STATEMENT OF THE CASE

On or about October 6, 1997, Appellant Steve Russell was involved in an incident in which a Mr. Mavadatt and Mr. Russell both called the Salt Lake County Sheriff's department alleging an assault. Although two officers came to the scene, no citations were issued at that time. No information was filed until January 13, 1998. Because Mr. Russell did not know until three months after the fact that he was even going to be charged, the opportunity to locate witnesses critical to his defense was completely lost. Numerous delays then followed, none of which were attributable to Mr. Russell, and all of which were requested or instigated by the State. Trial was not held until June 17, 1999, over 20 months after the alleged incident. By that time Mr. Russell could not locate any defense witnesses. A pre-trial motion to dismiss for lack of speedy trial was timely made prior to trial, and was renewed at trial. Mr. Russell was acquitted by a jury of Assault with Injury, a Class A Misdemeanor, but convicted of simple Assault, a Class B Misdemeanor. Sentencing was entered on August 26, 1999 at which time the motion to dismiss for lack of speedy trial was renewed. The motion was denied all three times that it was made.

SUMMARY OF ARGUMENTS

Over 3 months elapsed between the alleged incident and the filing of an information, and over 20 months elapsed between the time of the alleged incident and trial in the matter. As a result of this delay, Appellant was denied the ability to locate crucial defense witnesses and was thus prejudiced in his ability to defend himself at trial. Appellant was thus denied a speedy trial in violation of his rights under the Sixth Amendment to the U.S. Constitution and Article I, Section 12 of the Utah

Constitution.

ARGUMENT

THE COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL

The right to a speedy and public trial is guaranteed under the VIth Amendment to the United States Constitution and Article I, Section 12, of the Utah Constitution. In construing Article I, Section 12, of the Utah Constitution, the same analysis is applied as is used in applying the federal Constitution. State v. Velasquez, 641 P.2d 115, 116 (Utah 1982). In determining whether the Appellant's right to a speedy trial has been violated, the court must consider four factors. Those factors are (1) Length of the delay; (2) Reason for the delay; (3) Whether the Appellant effectively asserted the right to a speedy trial; and (4) Whether the Appellant was prejudiced by the delay. Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), State v. Woodland, 945 P.2d 665, 669 (Utah 1997).

A. Length of Delay

First is the length of the delay. In the instant case, the State failed to bring Mr. Russell to trial for over 20 months. In Barker the United States Supreme Court indicated that the length of delay that can be tolerated must be proportional to the complexity of the case. 407 U.S. at 530-31. Simple assault, a class B misdemeanor, is not a complex matter. The State's discovery was completed early in the process, and bears this out. Nevertheless, the State waited three months before even filing an information, three months in which Mr. Russell could have located the bystanders who witnessed the original incident. "The length of the delay is the triggering mechanism" for the Court to determine if the Appellant's right to a speedy trial has been violated. 407 U.S. at 531. A 20-month delay from

the time of the alleged incident until trial certainly creates a presumption of prejudice.

B. Reason for Delay

There are no facts in the record as to why there was a 3-month delay from the date of the incident until the first information was filed. Nor is there any indication why arraignment on the original information was not held until May 1, 1998.

At the first scheduled trial setting in Justice Court, the State's witnesses failed to appear. The Court ordered another pretrial conference and also ordered the State to have all their witnesses present. At the second pretrial conference, the victim failed to appear as well as Dr. Vogel. The State again requested a continuance for a pretrial conference. On September 23, 1998, almost one year from the alleged incident, the State's witnesses again failed to appear and the State, without stating a reason, moved for dismissal without prejudice to file in the District Court as a Class A charge of Assault with Injury.

When witnesses have legitimate reasons that make them unavailable for trial, delay on the part of the State can be excused in some cases. State v. Hoyt, 806 P.2d 204, 208 (Ut.App. 1991). In this case, no such excuse was offered. The witnesses simply failed to appear, repeatedly.

The State cannot allege in this case that Mr. Russell caused any of the delays. Indeed, the major failure in most speedy trial appeals is when the delay is caused by the defendant. State v. Hoyt, 806 P.2d 204, 208 (Ut.App. 1991), State v. Knill, 656 P.2d 1026, 1029 (Utah 1982), State v. Snyder, 932 P.2d 120, 130 (Ut.App. 1997). Clearly, that is not the case here. The State re-filed the information within three weeks of the Justice Court's order of dismissal, but never summoned Mr. Russell by either mail or service. The State has Mr. Russell's address and phone number. The State exercised no diligence whatsoever on this case, and Mr. Russell only learned that charges had been

re-filed when he made inquiry in April, 1999. Mr. Russell appeared at every hearing prepared for trial as best he could under the circumstances. The fact that all delays in this matter were caused by the State weighs heavily against the State. Barker, 407 U.S. at 531.

C. Assertion of Right

The record is clear that Mr. Russell amply asserted his right to a speedy trial throughout the proceedings, and the matter was not only heard at a hearing prior to trial but was again renewed at the commencement of trial. Mr. Russell has clearly met his obligation in asserting his rights and preserving the issue for appeal. Barker, 407 U.S. at 525, State v. Hoyt, 806 P.2d 204, 208 (Ut.App.

1991). *It is not actually necessary to show actual prejudice, as once a speedy trial inquiry is triggered, prejudice is presumed. Doggett v. U.S. 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed 2d 520 (1992). Nevertheless . . .*

D. Prejudice from Delay

“Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last . . .”

State v. Banner, 717 P.2d 1325 (Utah 1986)(citing Barker, 407 U.S. at 532, 97 S.Ct. at 2193)


It is the last factor that weighs in heavily in Mr. Russell’s case. Pursuant to U.C.A. §76-2-401(1) and 402(1), a party may be justified in the use of force if necessary to defend himself or another from physical force. In Mr. Russell’s case, no witnesses at trial other than Mr. Russell himself could testify that Mr. Mavadatt first used force against Mr. Russell. Although numerous persons at a neighboring business witnessed Mr. Mavadatt’s assault on Mr. Russell and could have testified that Mr. Russell acted in self-defense, by the time the matter came to trial, indeed, effectively by the time that Mr. Russell received the original information, there was no way that Mr. Russell could locate any of those witnesses. As a result, he could not effectively present the defense of justification.

In addition, Deputy Spencer, who interviewed the Appellant at the scene, took no notes nor did he file a police report. At an earlier pretrial conference, Spencer admitted that didn't remember the initial encounter with the Mr. Russell over the incident. Finally, Mr. Russell was unable to obtain the dispatch tapes which would have supported his defense of justification, as the State had not retained them. Mr. Russell was thus clearly and directly prejudiced by the delay, through no fault of his own. In addition to speedy trial concerns, such a pre-indictment delay violates a defendant's right to due process if such delay results in actual prejudice. State v. Byrns, 911 P.2d 981, 985, 986 (Ut.App. 1995). Clearly there has been such actual prejudice in this case.

CONCLUSION

The very essence of the right to a speedy trial is to prevent a defendant from being prejudiced in his ability to defend himself at trial. "The speedy trial right reserved under the Utah Constitution is no greater or lesser than its federal counterpart." State v. Banner, 717 P.2d 1325, 1328 n.3 (Utah 1986). In this case, the State was given several bites at the apple by being granted repeated continuances when its witnesses failed to show up for trial. At the same time, as a result of the long delay between the alleged incident and trial, Appellant was unable to locate witnesses who would have been critical to his defense of justification, as set forth under Utah law. The Appellant has met the criteria set forth under Barker v. Wingo, and his conviction should therefore be overturned.


DATED this 24th day of April, 2000.



Michael L. Humiston
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that an appropriate number of copies of the attached Appellant's Brief were mailed to Sirena M. Wissler, Salt Lake County Deputy Attorney, 2001 South State Street, S3400, Salt Lake City, Utah 84190, this 24th day of April, 2000.



Michael L. Humiston