1999

City of Salt Lake v. Keith Roberts : Reply Brief

Utah Court of Appeals

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W. Andrew McCullough; attorney for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

CITY OF SALT LAKE,	:	
	:	
Plaintiff/Appellee,	:	
	:	
vs.	:	Case No. 990876-CA
	:	
KEITH ROBERTS,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

APPEAL FROM A JUDGMENT OF THE THIRD DISTRICT COURT
OF SALT LAKE COUNTY, UTAH, HON. WILLIAM W. BARRETT

REPLY BRIEF OF APPELLANT KEITH ROBERTS

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ARGUMENT

POINT I

POINT I

DESPITE A CHANGE IN WORDING IN THE STATE STATUTE IN 1999, THE CITY ORDINANCE REMAINS IN CONFLICT WITH STATE STATUTE.

Appellant acknowledges a change in wording in the State statute governing "lewdness", effective in May, 1999. Prior to May of 1999, § 76-9-702 U.C.A. made it an act of lewdness to expose "genitals or private parts. . . in a public place. . . " in May of 1999, the statute was expanded to prohibit exposure of "genitals, the female breast below the top of the areola, the buttocks, the

anus, or the pubic area. . . ." the statute, however, now prohibits the exposure only "under circumstances which the person should know would likely cause affront or alarm. . . ." the previous statute had been in place in the form cited by Defendant for several years. Such a State prohibition was in effect when the City passed its ordinance. Nothing about the change supports the City's position that the ordinance is not in conflict with State law. In fact, it might be argued that the State Legislature found the term "public place" to be either unnecessary or too nebulous. The current statute does a sufficient job of protecting the public by prohibiting exposure in a manner "likely to cause front or alarm". The City quotes the case of Patterson v. Utah County Board of Adjustment, 893 P.2d 602 (Utah App. 1995) in support of the proposition that all ordinances are valid unless they "do not rationally promote the public health, safety, morals and welfare." This Court, however, in that case addressed only the extent of power delegated to cities. It did not discuss conflicts with State statutes. Nothing in that decision altered the fact that the City has no power to regulate the same conduct that is regulated by the State, in an inconsistent manner. As the Utah Supreme Court said in State v. Allred, 437 P.2d 434, 20 Ut.2d 298 (Utah 1968) the city has general police power except where the exercise of that police power is "prohibited by statute or inconsistent therewith." (1968.

UT. 36, ¶25 -- versuslaw.com). The City, of course, contends that the term "open to public view" prohibits a wider range of conduct than does the similar term "in a public place". Defendant contends that it is just the opposite. Nevertheless, when neither of the terms are defined, a citizen cannot be expected to differentiate between the terms. He is thus only required to take reasonable precautions to avoid exposure in a manner that he will be seen by others who might be offended. Appellee has sought to portray the evidence in this case as showing open conduct easily noticeable by casual passersby. As has previously been set forth in detail by the appellant, the conduct took place against two blank walls behind a parked truck. The only way that "casual" passerby could "sneak up" and get a look at what was going on, was by crawling under the truck. The City's attempt to finesse the ordinance cannot support a verdict of "guilty" in this matter. Both the State statute and the City ordinance were designed to prohibit the same conduct, that of public exposure of body parts which can be expected to offend public sensibility. Private conduct is not covered. If given enough time and enough authority, the police of this State could search out a lot of conduct with which they did not agree. Utah, fortunately, is not as widely known for that effort as is the State of Georgia. Out of that tendency to snoop into people's private lives have come some wonderful cases. In the

landmark case of Stanley v. Georgia, 394 U.S. 557 (1969) the United States Supreme Court held that private possession of pornographic material could not be criminalized. And in the more recent case of Powell v. State, 270 Ga. 327, 510 S.E.2d 18, (Ga. 1998) the Supreme Court of Georgia found a "right of privacy" in the State Constitution sufficient to prohibit the State from criminalizing private and consensual sodomy. The Court stated:

> Adults who "withdraw from the public gaze" to engage in private unforced sexual behavior are exercising a right "embraced within the right of personal liberty." We cannot think of any other activity that reasonable persons would rank as more private and more deserving of protection from governmental interference than unforced, private, adult sexual activity. (1998.GA.44286 ¶19 -- versuslaw.com).

This case was not prosecuted because there was exposure in a public place. It was prosecuted because the police believed that there was sexual conduct taking place, involving someone "they recognized [as] a prostitute" (Appellee brief pg.4). In this case, however, the City's ordinance which restricts conduct in "public" was clearly used to prohibit private conduct of which the police officers disapproved. If, in fact, there was a commercial sex act occurring, there is indeed a law that prohibits that. Unfortunately for the police, they have no proof of it. It is not enough to go searching for an ordinance which might be stretched to apply, when an officer cannot prove what he believes probably has happened. There are simply times when the police must recognize

that interference in personal lives must not be tolerated.

In People v. Legel, 24 Ill.App.3d 554, 321 N.E.2d 164 (Ill. App. 1974) the Court was faced with a man who undressed and fondled himself in the front window of his home "before unveiled glass doors, with a light overhead in plain view of the casual observer in the neighbor's living room." The Court observed:

> The defendant made no attempt to conceal his activities. To the contrary, the evidence reveals that he did everything possible in order to expose his lewd acts to others. The still photographs substantially collaborate the officer's testimony. The evidence is clear, convincing and uncontradicted. It leaves no doubt that the defendant's intent was to gain sexual gratification by causing shock and consternation in those who observed his exhibition. 321 N.E.2d at 167.

Once again, the argument was over the term "public place". Defendant claimed that his own home could not be a "public place" for any purpose. The Court first cited the committee comments of the Illinois legislature, in passing the lewdness statute:

> It is the probability of public view that is crucial rather than the ownership or use of the particular real estate upon which the act occurs. For example, a person standing nude before a lighted window of his private apartment at night, adjacent to a well traveled public sidewalk would be, for purposes of the statute, in a public place. Contrariwise, a couple in a parked car on a public right-of-way but in the lonely lane might not be in a public place, depending upon the likelihood of others traversing this particular area at such hours. 321 N.E.2d at 168.

The Court went on to observe:

> The vantage point of the observer is relevant only insofar as it sheds light on the controlling inquiry on whether there was

> a reasonable expectation that the actor's conduct would be viewed by others. The purpose of this section is to protect the public from shocking and embarrassing displays of sexual activities.
>
> The duty lies with the deviate to keep his activities private. Where the evidence shows that it was reasonably foreseeable that the lewd conduct would be viewed by the casual public observer, there is a reasonable expectation of public view and the acts can be held to have occurred in a "public place" by reason of the statutory definition. id.

The conduct of this Defendant was not that of the Defendant in Legel. The officer admitted that he did not think the defendant expected to be observed, nor did he wish to be. Obviously Defendant did not realize he was being trailed by someone who would "sneak" under a truck in order to make the observation. No casual observers did, in fact, observe the behavior. Defendant thought his conduct was private. The activities of this officer could not reasonably have been expected; and Defendant met his duty to the public at large.

POINT II

DEFENDANT DID NOT RAISE THE ISSUE OF VAGUENESS FOR THE FIRST TIME ON APPEAL.

The City contends that Defendant has raised the argument that the City disorderly conduct is void for vagueness for the first time on appeal. In fact, Defendant does not contend that the ordinance is facially invalid for vagueness. He only contends that, if the ordinance can be stretched as far as Plaintiff contends it can be, it becomes unconstitutionally vague as applied.

In fact, Defendant did make the same arguments at trial. It should be noted that counsel filed his appearance in behalf of the Defendant in the District Court on August 25, 1999. Trial was held on August 30. Needless to say, the trial memorandum was written quickly. Nevertheless, Defendant did argue the meaning of the terms "open to public view" and "in a public place"; and Defendant did suggest that the term open to public view could not be construed as broadly as the City claimed. That is still the essence of Defendant's argument. Defendant has not opened a new front by suggesting that the way the City interprets the ordinance it so vague that it cannot be reasonably interpreted by those seeking to comply with it.

It is the City that has sought to broaden the issues on appeal. At no time in the trial court, did the City set forth its legal theory supporting the contention that there was sexual conduct between the Defendant and his companion. Sexual conduct is clearly defined by State law, in §76-10-1301 (4), cited in Defendant's brief. The City never cited their obviously inconsistent ordinance at trial. The trial court could not have relied on it in finding Defendant guilty. It was obvious that the police officer was looking for something that was prohibited by the State and City laws against commercial sex. Such prohibition includes only the acts prohibited by §76-10-1301. Defendant concedes that the officer alleged that he saw the exposed breast from further away than he was when he allegedly observed the

exposed penis. That does not matter. The officer was in no sense a casual passerby. Defendant's statement of facts detail the efforts of the officers in which they "snuck around" to approach the car unseen. Even conceding what the City now argues, that it was not the exposed penis at all, does not change the legal or factual situation.

POINT III

APPELLEE CITES AN INCORRECT STANDARD IN ITS ARGUMENT THAT THE TRIAL COURT SHOULD NOT BE OVERTURNED. A REMAND FOR RETRIAL MAY BE NECESSARY, BECAUSE OF THE FACTUAL QUESTIONS.

The City, in its brief, cites correct standards of review in its initial reference on page one. In Point IV of the brief, however, the City argues (in slightly less than one page) that the trial court should not be overruled unless its "factual findings" are deemed "clearly erroneous". At best, the question is a mixed one of fact and law "which, on review, do[es] not require the deference due to findings on questions of pure fact." See Margulies by Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985). Defendant contends, however, that this is primarily an issue of law upon which the trial court is not granted deference at all. At issue is the meaning of an ordinance. In making the one page argument in Point IV, the City has certainly mischaracterized the evidence. The City states "officer Russell while standing in the parking lot could see the defendant parked in the car kissing the exposed breasts of the women he was with." It is further stated that the conduct "occurred in a parking lot where customers of the

lounge were walking back and forth to their cars". In fact, the conduct did not so occur. The parking lot in which customers may have been walking back and forth to their cars, was blocked from viewing the Defendant by the presence of the large truck. It is indeed difficult to preserve the feel of the evidence as reviewed by the District Court, due to the fact that it appeared impossible to preserve the drawings (TR 10). Nevertheless, the testimony as set forth on pages 4 through 6 of Appellant's previous brief clearly shows that Defendant was well away from where customers might be. Appellant comes to this Court somewhat frustrated by the lack of drawings and other material which might better inform this Court of the exact facts of this case. Yes, the Trial Court did have some advantage over this Court in reviewing those facts. Nevertheless, the Trial Court misconstrued the law, and based its decision on a misapplication of that law. Plaintiff states in the "standard of review" section of its brief that "a remand is unnecessary where undisputed facts allow Appellate Courts to fairly and properly resolve the case on the record." In doing so, the City cites Flying Diamond Oil v. Newton Sheep Co., 776 P.2d 618 (Utah 1989). Conversely:

> It is generally the law that the failure of a trial court to make findings on all material issues necessary to support its judgment is an error that usually requires a remand for the purpose of allowing the trial court to make such findings. 776 P.2d at 622.

Defendant acknowledges that it may be difficult for this Court to envision the circumstances without the drawings made by the police officer. It is the right and duty of this Court, however, to interpret the law. Defendant believes that the record is sufficient to show that he is not guilty of the crime charged. If, however, the Court cannot determine that as a matter of law, this Court should then set forth the legal standard that the Trial Court should use and remand this matter to the Trial Court to review the facts once more in light of the proper legal standards. It is not sufficient to say that the facts may have been adequate to prove Defendant guilty, when it is clear that the Trial Court used the wrong legal standards. Defendant asks, of course, that this case be reversed and dismissed immediately. In the alternative, however, this Court should consider remanding the case for further proceedings consistent with its opinion on the law.

CONCLUSION

Defendant is entitled to a judgment dismissing the charge brought against him. In the alternative, this Court should remand this matter for a retrial after correcting the trial court's errors of law in interpreting the ordinance at issue.

DATED this 18 day of February, 2000.

W. ANDREW MCCULLOUGH, L.L.C.

W. Andrew McCullough
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 18 day of February, 2000, I hand delivered two true and correct copies of Appellant's Reply Brief to Richard Daynes, Attorney for Appellee, 349 South 200 East, Suite 500, Salt Lake City, Utah 84111.