

1981

State of Utah v. Max D. Giles : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MAX D. GILES,

Defendant-Appellant.

BRIEF OF RESPONSE

APPEAL FROM THE DECISION OF THE
JUDICIAL DISTRICT COURT IN
COUNTY, STATE OF UTAH,
DAVID B. DEE, JUDGE.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.
17335

MAX D. GILES, :

Defendant-Appellant. :

----- : -----
BRIEF OF RESPONDENT

APPEAL FROM THE DECISION OF THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SUMMIT
COUNTY, STATE OF UTAH, THE HONORABLE
DAVID B. DEE, JUDGE, PRESIDING

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CASES CITED

Utah Code Ann. § 73-18-12(1) (1953), as amended----	1,2,8
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IN THE SUPREME COURT OF THE
STATE OF UTAH

- - - - - : - - - - -
STATE OF UTAH, :
Plaintiff- Respondent, :
-vs- : Case No.]7335
MAX D. GILES, :
Defendant-Appellant. :

- - - - - : - - - - -
BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the affirmance of an appeal to the Third District Court from a criminal conviction of the Defendant-Appellant in the circuit court.

DISPOSITION IN THE LOWER COURT

The defendant-appellant was found guilty in the Fifth Circuit Court, Coalville, Department, by Judge Larry R. Keller, of wreckless operation of a motor boat in violation of § 73-18-12(1); the conviction was appealed to the District Court, and was affirmed by Judge David B. Dee.

RELIEF SOUGHT ON APPEAL

Affirmance of the decisions of the district and circuit courts.

STATEMENT OF THE FACTS

Appellant was issued a citation for exceeding a slow wakeless speed within 100 feet of another boat; appellant promised to appear thereon at the Summit County Courthouse by August 14, 1979 (R. at 1). By August 15, 1979, appellant failed to appear and a bench warrant was issued for his arrest with the bail set at \$50.00 (R. at 3). Later that day, apparently, \$25.00 was received in the mail by the clerk's office and the bench was not issued, but the bail was never forfeited on the case (R. at 3, Tr. at 9).

On October 31, 1979, a criminal complaint was issued charging the defendant with violation of Reckless Operation of a Motor Boat in violation of § 78-18-12(1), Utah Code Annotated (R. at 12). The appellant was duly arraigned on November 21, 1979, and a trial set for December 12, 1979 (R. at 5, 7). On December 11, 1979, an attorney enters an appearance and the trial is continued to another day. On the day of the trial, appellant for the first time orally moved to have the matter dismissed on the basis that he had already been prosecuted on the original citation

which was a part of the same criminal episode as the present complaint (Tr. at 4-6). The trial court held that bail had never been forfeited on the original citation, thus there had been no adjudication, therefore the current prosecution was not barred by the single criminal episode statute (Tr. at 7-9). The trial went forward and the defendant was convicted as charged (Tr. at 21, 50). Appellant appealed the conviction to the District Court and Judge David B. Dee affirmed the conviction (Tr. at 78).

ARGUMENT

POINT I

THE MERE POSTING OF BAIL FOR APPEARANCE
ON A CRIMINAL OFFENSE IS NOT AN ADJUDICATION
OF GUILT BARRING PROSECUTION FOR OFFENSES
ARISING OUT OF THE SAME CRIMINAL EPISODE.

The posting of bail for appearance on a criminal offense is merely a procedure to insure the appearance of the defendant at the time of trial. On very minor offenses, if a person fails to appear as promised, a court may merely forfeit the bail as a matter of judicial economy in lieu of issuing a warrant for the arrest of the person for his failure to appear. There is no constitutional or other requirement placed on courts to forfeit bail; and such forfeitures are discretionary with the court. Obviously, a forfeiture of bail cannot take place until after the time set for the appearance of the defendant has expired, because

a criminal defendant has a right to an appropriate arraignment on the charge(s) and a trial. In the present case, at the time of the appearance of defendant before the court, through his duly authorized attorney, the court had not forfeited the bail which was posted to assure the defendant's appearance.

The court explicitly explained to appellant:

On this case, bail was posted. As you know, the legal status of bail is to insure the defendant's appearance in court. And this court has adopted the procedure that when forfeited by the court, then it constitutes an adjudication of the offense.

However, this court specifically did not order forfeiture of bail. No forfeiture of bail appears in the file. The record also shows that a citation was issued to the defendant appellant requiring him to appear by August 14, 1979. (R. at 1).

(emphasis added.) On August 15, 1979, the matter was called up by the court and a minute entry shows that defendant: "Failed to appear prior to August 14. Bench warrant to issue. Bail set at \$50.00." (R. at 3.) Apparently later that day a check for \$25.00 did arrive, because there is a handwritten note that the bench warrant did not issue (R. at 3). The \$25.00 bail was never forfeited by the court as indicated by the record and the court above.

Although appellant's bail was never forfeited, appellant tries to make some significance of the fact that

a bail schedule had been established by the court. (App. Br. at 7.) The State submits that no significance can or should attach to the fact that a bail schedule is issued from any court to clerks of the court, to jail personnel in charge of custody, or to whomever. Many bail schedules include amounts of bail for extremely serious felonies and serious misdemeanors. However, the fact that a schedule is established and jail personnel are able to release individuals who post the appropriate scheduled amount does not deprive the court having jurisdiction over that serious misdemeanor or felony from the discretion to have the defendant personally appear at the time that he has promised to do so. Yet appellant's reasoning would cause such a result.

Even if the defendant-appellant had failed to appear at court, and even though the local practice of the court may have been to forfeit bail on minor offenses instead of requiring the appearance of the defendant at court, the State submits that the court is and should be clothed with the discretion to require the appearance of a defendant instead of forfeiting bail.

The appellant also tries to lend significance to the fact that the bail money may have been sent to the Division of Wildlife Resources. The court explained the matter as follows:

And if, in fact, the twenty five dollars was sent to the division of wildlife resources, it was done so without my knowledge and would've been in error because it was set as bail. And until it is formally forfeited, it ought not to be sent anywhere.

But, nevertheless, those are ministerial problems I think can be solved here, in this circuit court, and this court formally rules that there has not been an adjudication of this offense. (Tr. at 9).

The court then went on to state that since there had not been an adjudication, the State had the right to answer the complaint to charge the offense of reckless operation of a motor boat, and therefore appellant's motion to dismiss as a result of the single criminal episode was denied (Tr. at 9).

The mere fact that an appearance bond is posted and held by some agency awaiting further order of the court, does not constitute a forfeiture of the bail, which could be considered an adjudication, until the defendant has failed to appear and the judge specifically entered an order forfeiting the bail instead of requiring the appearance of the defendant.

§ 76-1-403, Utah Code Ann., 1953, as amended, clearly defines the only instances in which a former prosecution bars a subsequent prosecution for a crime arising out of the same criminal episode:

76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.—(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under section 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

- (i) Resulted in acquittal; or
- (ii) Resulted in conviction; or
- (iii) Was improperly terminated; or
- (iv) Was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

The statute continues by defining the terms used in § 76-1-403

(1)(b)(i)(ii)(iii) and (iv), above. In the present case, clearly, there had not been an acquittal, a conviction, an improper termination, or a termination by final order that required a determination inconsistent with that necessary for a conviction. Thus the single criminal episode statutes to which appellant refers, and upon which appellant relies defeat his own argument. (App. Br. at 7).

POINT II

THE INTENT REQUIRED BY § 73-18-12(1)
UTAH CODE ANNOTATED, 1953 AS AMENDED,
IS NOT UNCONSTITUTIONALLY VAGUE.

Section 73-18-12(1) defines the crime under which appellant was convicted, and states:

No person shall operate any motor boat . . . in a reckless or negligent manner so as to endanger the life, limb, or property of any person.

Appellant inappropriately avers that the Utah State Code does not give a definition for "reckless" or "negligent," therefore those terms must incorporate the definitions of civil law (App. Br. at 10). That is not the case. The criminal code at Section 76-2-103, Utah Code Ann., 1953, as amended, specifically defines the terms "recklessly" and "with criminal negligence." Both of these definitions apply to § 73-18-12(1), under which the defendant was convicted, in spite of the fact that that offense is not defined in the general criminal code (76-1-101, et seq.). Section 76-1-103 specifically states that "the provisions of this code shall govern the construction of, the punishment for . . . any offense defined outside this code." Thus the definition of "recklessly" and "with criminal negligence" in § 76-2-103 would apply to the present case.

It should be noted that the court below specifically found "reckless" conduct on the part of the defendant and thus any discussion of negligence is moot as to this case:

And the court sees that as reckless disregard, in addition to the fact that he was within thirty feet of that boat before he even realizes it's there.

Therefore, I find the defendant guilty as charged, of the offense of reckless operation of a motor boat. (Tr. at 109.)

(Emphasis added.)

Certainly there is nothing in the record to indicate that any civil definition of negligence was applied in this case by the court, especially in view of the fact that the court specifically found reckless conduct.

Even if the record were silent as to whether or not reckless conduct were found, and even if some type of speculation were appropriate as to the standard used by the Court, a person such as Judge Keller who acted for many years as legal defender for Salt Lake County, and was in the full-time practice of criminal law before going on the bench, would be presumed to have known the appropriate definitions of recklessness and with criminal negligence.

The definition of the crime under which appellant was charged, and the definition of "recklessly" in the code

put a person of average intelligence on notice of the conduct proscribed.

There is no indication that the question of the requisite intent was raised in the trial court level. Because of the lack of contemporaneous objection, the matter should not now be considered on appeal.

POINT III

THE SUFFICIENCY OF THE EVIDENCE IN THE PRESENT CASE IS NOT BEFORE THIS COURT, AND EVEN IF IT WERE, THE RECORD IS SUFFICIENT FOR A CONVICTION.

This Court has long established the rule that it will not review appeals taken from a circuit court to the district court unless there is some constitutional question involved. The State submits that the only two constitutional issues raised by appellant were dealt with in Points I and II and that sufficiency of the evidence is not a constitutional issue. Even if the Court were to look at the facts in this case, the State submits there is sufficient evidence upon which to convict the defendant. Quoting merely from the judge's findings briefly to indicate the type of evidence considered:

He tells us, by his own statement, that he sees the boat in the water with the water-skier. The testimony from the witness on shore is he's proceeding either in a straight line or an arc in the direction of that boat and the further testimony is that, by his own testimony, he was 100 yards away when he first saw that, which is only 300 feet.

And then, for some inexplicable reason, the next time he sees that boat, he's 30 feet away, he has to turn to avoid the collision and rams a waterskier and probably is very fortunate that the skier was not killed in this case. (Tr. at 108.)

The State submits that there is certainly sufficient evidence to uphold the conviction even if that were an appropriate consideration for this Court.

CONCLUSION

The bail posted on the original citation was never forfeited; therefore, nothing barred prosecution of the defendant for any crimes arising out of the same criminal episode. The definition of "recklessly" which has been upheld by this Court on many occasions, is not unconstitutionally vague or overbroad, and was used by the lower court in determining appellant's guilt. Sufficiency of the evidence is not before this Court, but even if it were, the evidence was patently sufficient for conviction.

Respectfully submitted,

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CERTIFICATE OF MAILING

Mailed two copies of the foregoing Brief of
Respondent to Mr. Robert A. Echard, Attorney for
Appellant, 427 - 27th Street, Ogden, Utah 84401, this
_____ day of April, 1981.
