1981

State of Utah v. Jerry Long : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

---oooOooo---

STATE OF UTAH :
:
Plaintiff-Respondent, :
:
vs. :
:
JERRY LONG :
:
Defendant-Appellant. :

---oooOooo---

BRIEF OF A[illegible]

---oooOooo---

Appeal From a Judg[illegible]
the Fourth Judicial Dis[illegible]

Honorable C[illegible]

---oooOooo---

DAVID WILKINSON
Utah Attorney General
Attorney for Plaintiff-Re[illegible]
236 State Capitol
Salt Lake City, Utah 841[illegible]

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

---ooo0ooo---

STATE OF UTAH	:	
Plaintiff-Respondent,	:	
vs.	:	Case No. 17511
JERRY LONG	:	
Defendant-Appellant.	:	

---ooo0ooo---

BRIEF OF APPELLANT

---ooo0ooo---

Appeal From a Judgment of Conviction Entered in the Fourth Judicial District Court in and for Utah County

Honorable George E. Ballif

---ooo0ooo---

PHILIP G. JONES
MCCULLOUGH & JONES
Attorneys for Defendant-Appellant
930 South State Street Suite 10
Orem, Utah 84057

DAVID WILKINSON
Utah Attorney General
Attorney for Plaintiff-Respondent
236 State Capitol
Salt Lake City, Utah 84114

TABLE OF CONTENTS

Statutes Cited

Cases Cited

Other

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

---ooo0ooo---

STATE OF UTAH	:	
Plaintiff-Respondent,	:	
	:	Case No. 17511
vs.	:	
JERRY LONG	:	
Defendant-Appellant.	:	

---ooo0ooo---

BRIEF OF APPELLANT

---ooo0ooo---

STATEMENT OF NATURE OF CASE

Jerry Long was charged with the violation of §58-37-8(1)(ii), Utah Code Annotated, 1953 as amended, a felony. The information alleged that on or about the 5th day of March, 1980, he knowingly and intentionally distributed for value lysergic acid diethylamide, a schedule I controlled substance.

FACTS AND DISPOSITION IN THE LOWER COURT

At Defendant's first trial on September 18, 1980, he used an alibi defense consisting of testimony from friends and family that the Defendant was nowhere near the scene of the alleged crime as charged by the State. This resulted in a hung jury.

Prior to Defendant's second trial on November 20, 1980,

the same witnesses consisting of Defendant's family and friends were again subpoened. All of the witnesses subpoened appeared at trial except for two non-family witnesses who were not served by the Sheriff's office until 12 hours after the trial had concluded. At this second trial, the jury convicted the Defendant over his alibi defense. The trial court denied motion by defense counsel for a new trial based upon failure of the county constable to serve Defendant's witnesses in a timely fashion.

RELIEF SOUGHT ON APPEAL

The Appellant requests that his sentence be vacated, and that this Court grant him a new trial.

ARGUMENT

I. THE UTAH COUNTY CONSTABLE'S FAILURE TO SERVE THE WITNESSES SUBPOENED BY DEFENDANT DENIED HIM HIS RIGHT TO COMPEL THE ATTENDANCE OF WITNESSES BY THE PROCESS OF LAW AND PREJUDICED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

Utah Code Annotated, 1953, §77-1-6, as amended, provides as follows: "RIGHTS OF DEFENDANT-(1) in criminal prosecutions the Defendant is entitled: . . . (e) to have compulsory process to insure the attendance of witnesses in his behalf. . ." and the Utah Rules of Criminal Procedure, in Utah Code Annotated, 1953, §77-35-14, as amended, provides in part:

> SUBPOENA (a) . . . the clerk of the court in which a case is pending shall issue and blank to the Defendant, without charge, as many signed subpoenas as the Defendant may require. (b) A subpoena may command a person to whom it is directed to appear and testify or to produce in court or to allow inspection of records, papers or other

> objects. The court may quash or modify the subpoena if compliance would be unreasonable. (c) A subpoena may be served by any person over the age of 18 years who is not a party. Service shall be made by delivering a copy of the subpoena to the witness or interpreter personally and notifying him of the contents. A peace officer shall serve any subpoena delivered to him for service in his county. (emphasis added).

It seems clear that the Defendant in a criminal prosecution has a right to have the compulsory processes and powers of the state to insure the attendance of witnesses in his behalf at trial. And Rule 14 of the Utah Rules of Criminal Procedure places a mandatory duty upon peace officers to serve any subpoena delivered to them for service in the county. Subparagraph (d) of Rule 14 also provides that "written return of service of a subpoena shall be made promptly to the court and to the person requesting that the subpoena be served, stating the time and place of service and by whom service was made" (emphasis added). That is a peace officer, as an officer of the state, has an affirmative duty to serve any subpoenas delivered to him in a timely and a prompt manner, and deliver a return of service in a like manner. In State v Sandoval, 590 P.2d 346 (Utah 1979), this court said:

> Any Defendant in a criminal case has a right to call any witness who can offer testimony in his favor. No witness has a right to withhold testimony unless the testimony would tend to incriminate himself. 590 P.2d at 347.

Before Defendant's second trial, he delivered subpoenas to the Utah County Constable for the same 6 persons, consisti

of family and friends, as had testified at his first trial. However on November 20, 1980, at Defendant's second trial, only witnesses who were related to the Defendant had received subpoenas and actually testified at trial. The two witnesses at the prior trial who were not related to the Defendant were not served by the Utah County Constable until 12 hours after the end of the trial. No evidence was ever offered that the constables had made a diligent search or effort to serve these two potential witnesses with said subpoenas. The trial court was unperterbed at these witnesses absence in the second trial, and held that their testimony was merely cumilative in the case of the second trial, and their absence was not prejudicial to the Defendant's interest. The obvious flaw in such an approach is a fact that Defendant was convicted the second time in the absence of testimony by non-relatives, where in the first trial with the testimony of witnesses not related to the Defendant, no conviction was reached. Although all the witnesses testified to the same thing, that is that the Defendant was at a different location at the time of the alleged crime than the location alleged by the state, and in that sense the testimony was cumilative, there is a clear difference in the weight given to testimony by witnesses who were relatives with the Defendant and those who were not. The jurors in such a case are obviously much more likely to give little credence to testimony from related and interested persons, than to testimony by persons unrelated to the Defendant. The very fact that in the second trial the Defendant was

convicted without the testimony in his behalf of witnesses who were not related to him attest to the fact that their absence was extremely prejudicial to him.

Because the absence of Defendant's witnesses was direct attributable to a failure by the Utah County Constable to abide by its statutory duty to serve subpoenas of the Defendant in a timely and prompt fashion aggrevates the denial to the Defendant of his rights to the state's compulsory processes. At the very least an effort should have been made at trial to ascertain whether or not the county constable had made a good faith effort to serve the witnesses but was unable to until after the trial. However no such information appears in the record. Therefore the Appellan right to the compulsory processes of the law to procure witnesses to testify in his behalf at trial was violated by the constable's failure to serve the potential witnesses unti after the trial, and Defendant's conviction at this second trial should be vacated.

II. THE EVIDENCE OBTAINED AGAINST THE DEFENDANT WAS OBTAINED BY A PEACE OFFICER OUTSIDE HIS JURISDICTIONAL BOUNDARIES AND SHOULD NOT HAVE BEEN ADMITTED AT TRIAL.

As a general rule, in the absence of statutory or constitutional authority a peace officer has no official power to arrest beyond the territorial boundary of the state, city, or county for which he is elected or appointed. Irwin v State Department of Motor Vehicles, 517 P.2d 619 (Wash. 1974); Stat

v Hodgson , 200 A.2d 567 (Del. Sup. 1964); State v Williams, 347 A.2d 333 (NJ. 1975); Boswell v State, 19 So.2d 94 (Ala. 1944).

There is no common law authority for a police officer to act beyond city boundaries. Martin v Houck, 54 S.Ct. 291 (1906); 5 Am.Jur., arrest, §50. Consequently, unless the state of conduct was authorized by statute, the conduct is illegal.

§77-9-3 Utah Code Annotated, 1953, as amended, has authorized a peace officer's authority beyond the limits of his normal jurisdiction in certain limited circumstances:

> (1) Any peace officer duly authorized by any governmental agency of this state may exercise a peace officer's authority beyond the limits of such officer's normal jurisdiction as follows: (a) When in fast pursuit on an offender for the purpose of arresting and holding that person in custody or returning the suspect to the jurisdiction where the offense was committed; (b) when a public offense is committed in such officers presence; (c) when participating in an investigation of criminal activity which originated in such officer's normal jurisdiction in cooperation with the local authorities; (d) when called to assist peace officers of another jurisdiction.
>
> (2) Any peace officer prior to taking such authorized action, shall notify and receive approval of the local law enforcement authority, or at such prior contact is not reasonably possible notify the local law enforcement authority as soon as reasonably possible. Unless specifically requested to aid a police officer of another jurisdiction or otherwise provided for by law, no legal responsibility for a police officers actions outside his normal jurisdiction as provided herein, shall attach to the local law enforcement authority.

A peace officer may then exercise his authority when outside the limits of his normal jurisdiction when he is in

fresh pursuit, returning a suspect to the jurisdiction where the offense was committed, where an offense is committed in the officer's presence, in investigations which being in one jurisdiction but enter another (in cooperation with the local authorities), and when expressly requested to by officers of another jurisdiction. In the instant case, Officer Winn testified that they left the city of Pleasant Grove and arrived in the city of Orem where an alleged sale of drugs was made. Officer Winn was clearly not in fresh pursuit and was not returning any suspect to a jurisdiction where an offense was committed. He was not participating in an investigation which began in his jurisdiction and entered another jurisdiction in cooperation with the local authority, nor had he been expressly requested to assist the officers within the Orem City jurisdiction. In fact, no one in the Orem City Police Department even knew Officer Winn was active in their city. The only possiblity under which Officer Winn may have been properly authorized to act as a peace officer is when and if a "public offense" was committed in his presence. However were the public offenses not committed within the jurisdiction of Officer Winn, he would not be exercising his duties as a peace officer per se. Instead he would be acting under the authority granted to any other ordinary citizen who observes the commission of a public offense. Utah Code Annotated, 1953 §77-7-3, as amended, sets forth the requirements for a valid

arrest:

> BY PRIVATE PERSONS-a private person may arrest another: (1) for a public offense committed or attempted in his presence; or (2) when a felony has been committed and he has reasonable cause to believe that the person arrested has committed it.

That is when Officer Winn left his jurisdictional territory, in Pleasant Grove, and arrived in Orem City, State of Utah, in order to exercise his peace officer's authority, he had to come within the above-listed requirements of hot pursuit, permission, etc. But the only paragraph of §77-9-3 which would validate his actions is sub-paragraph (1)(b): "when a public offense is committed in such officer's presence". And the only authority which he could be exercising there would be the same which a private person could exercise under the same circumstances. This principle has been solidly established in Utah law since the case of People v Coughlin, 44 P.94 (Utah 1896). In that case the Supreme Court upheld the Defendant's conviction for murder despite the fact that he was arrested by Sheriffs outside the county of their jurisdiction, and after they had pursued him across several different counties. The court considered the predecesors statute to §77-7-3 which provided as follows:

> A private person may arrest another: (1) for a public offense committed or attempted in his presence. (2) When a person arrested has committed a felony although not in his presence. (3) When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it. Compiled Laws of Utah §4855.

The Coughlin court reasoned that because there was no doubt that a felony had in fact been committed and the offic had a reasonable cause for believing the persons they were attempting to arrest had committed it, the arresting officers, "though acting as private persons, had the right, under the circumstances to arrest [the defendants]". 44 P. at 95. In the case at bar, if Officer Winn was acting under any authority at all while in the City of Orem, he was acting as an ordinary citizen was entitled to act under Utah Code Annot §77-7-3. The question then becomes whether or not the Defend committed or attempted to commit a public offense in his pres

The State of California considered a factual situation virtually identical to the case at bar in People v Aldapa, 17 Cal.App. 3d. 184, 94 Cal.Rptr. 579 (1979). The Appellant court in that case reversed the Defendant's conviction of possession of heroin for sale because the arrest by a city police officer outside the city police jurisdiction was not authorized by the statute governing the power to make arrests outside city limits. Evidence in that case established that several informants had contacted city police officers of Los Angeles to the effect that the Defendant was selling narcotic at a location outside the city, but within the County of Los Angeles. The officer's conducted surveilances of the premise observed circumstances they deemed suspicious, and rushed the residence of the Defendants, arresting the occupants. At th

time of these arrests California Penal Code, §817, as amended, provided in its pertinent part:

> The authority of a peace officer extends to any place in the state (a) as to a public offense committed or which there is probable cause to believe has been committed within the political subdivision that employs him or (b) if he has the prior consent of the chief of police or person authorized by him to give such consent if the place is within a ciy or the sheriff or person authorized by him to give such consent of the place is within a county . . .

The record at trial showed no proof of prior authorization and a lack of probable cause. The court then stated:

> Since the officers did not fall within the provisions of §817, their power to arrest when acting beyond the limits of the geographic area under their authority would be that conferred upon a private citizen in the same circumstances. (citations omitted) The authority for a private citizen to make an arrest is provided by Penal Code, §837: "A private person may arrest another: (1) for a public offense committed or attempted in his presence. (2) When the person arrested has committed a felony, although not in his presence. (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it." 94 Cal. Rptr. at 581.

The court decided that the officers only hope at qualifying under the statutory provisions was under paragraph 3 of Penal Code, §837. Further:

> Considering the third provision of the statute, the question becomes one of its interpretation. For there to be a valid arrest by a private citizen under Penal Code, §837 (3) the requirement that there in fact be a felony committed can only be met if there is evidence of the corpus delicti and it is an offense known by the arresting party to have been committed. (Citations omitted) A private citizen unlike a peace officer may not arrest whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence, or whenever he has reasonable cause to believe that such person has committed a felony, whether or not a felony has in fact been committed. The corpus delicti for possession of narcotics for sale is (1) possession and (2) possession for purposes of sale. (citation omitted). At the trial, the only evidence offered to show possession of heroin was the heroin found after Defendant was arrested. Id. at 582.

Under the circumstances of the Aldapa case or as the cas at bar, the only evidence which was offered to show the knowl by the officer of a prior offense having been committed was that evidence seized when the officer was outside his jurisdi tion, acting as a private citizen. And by conducting the pur of an allegedly illegal drug as a private citizen, Officer W was clearly exceeding his authority, and his action was illeg

Although the State of Utah used to hold that the fruits an illegal search or evidence obtained illegally were admissa at trial (State v Fair, 353 P.2d 615 (Utah 1960)) the United States Supreme Court has since that time established the excl sionary rule which countermands the use of evidence obtained illegally. Wong Sun v United States, 371 U.S. 471 83 S.Ct. 407, (1963). But that same court has held that mere irregula in the manner in which a Defendant may be brought into custo

of law are not grounds for holding that he should not be tried for the crime with which he is charged. Ker v Illinois, 119 U.S. 436, 7 S.Ct. 225 (1886). And most recently in United States v Crews, 445 U.S. 463, 100 S.Ct. 1244, (1980), the court stated:

> Insofar as [defendant] challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was percepitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to a subsequent prosecution, nor as a defense to a valid conviction. 445 U.S. at 474.

The position of the United States Supreme Court is that where evidence is obtained illegally it may not be presented for consideration of the jury at trial, although the Defendant may still be tried on the charges to which that evidence pertained.

In City of Pasco v Titus, 613 P.2d 181 (Wash. App. 1980), the Washington Court of Appeals reversed a decision by the trial clerk to dismiss charges against the Defendant on the grounds that he had been illegally arrested. The Court held that dismissal of the charges not required merely because of the illegal arrest, and the trial court, instead of dismissing the case, should have merely ruled that the city could not introduce the evidence it obtained by its illegal actions to prove the charges against the Defendant.

In Washington v Renous, 299 P.2d 620 (Utah 1956), the Utah Supreme Court held that where the Defendants illegally returned to the state and incarcerated, and the Defendants may have potential civil and/or criminal actions against the wrongdoers, the

state still had the power to try the accused of the crimes with which they were charged. Likewise in State v Beak, 584 P.2d 870 (Utah 1978), the court held that:

> The "probable cause" required for a warrent of arrest, if lacking, may prevent the introduction of unlawfully seized evidence at the trial, but it does not prevent the trial and conviction of the Defendant. 584 P.2d at 872.

The evidence used to convict the Defendant at trial was obtained by the explotation of information illegally obtained by officers of the state while outside their jurisdiction. Although the exclusionary rule mandates that such evidence not be admissable at trial, the state may nevertheless still bring charges against the Defendant without the use of such evidence. However because the evidence was directly involved in the trial below, where Defendant was convicted, this court should vacate the conviction of Defendant and order a new trial to be held without the admissability of the aforesaid evidence.

CONCLUSION

This case allows the Court to rule on the question of whether or not the Defendant's right to the compulsory process of the state in assuring the attendance of his witnesses at trial includes showing by this state that any failure to serve subpoenas and to secure the attendance of witnesses for the Defendant on behalf of the police was not as a result of their failure to exercise diligence. In this case at the second trial some of the subpoenas were served, and some of them were not. Because

the most credible witnesses (at least to the jury) were not subpoened and not present at Defendant's second trial, he was convicted. The Court likewise has an opportunity to rule on the question of whether or not the narcotics officer's actions outside their assigned jurisdiction comes within that narrow range of circumstances innumerated under §77-9-3. Certainly until now such officers have had the almost unlimited discretion to go wherever they desire as long as they could roughly equate their activity to being connected with a "public offense", no matter where it was actually committed. For the above reasons, counsel for the Defendant respectfully requests that the Court vacate the judgment of guilty against Defendant rendered by the trial court below, and remand the case for trial.

RESPECTFULLY SUBMITTED this ____ day of April, 1981.

Philip G. Jones
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Brief of Appellant, to the Utah Attorney General, David Wilkinson, 236 State Capitol Building, Salt Lake City, Utah 84114, this ____ day of April, 1981.