1981

State of Utah v. Jerry Long : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF [illegible]

STATE OF UTAH

STATE OF UTAH

Plaintiff-Respondent,

-v-

JERRY LONG

Defendant-Appellant.

Appeal from [illegible]
Fourth Judicial [illegible]

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

STATE OF UTAH :

Plaintiff-Respondent, :

-v- : Case No. 17511

JERRY LONG :

Defendant-Appellant. :

- - - - - - - - - -

BRIEF OF RESPONDENT

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

Honorable George E. Ballif

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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JERRY LONG	:	
Defendant-Appellant.	:	

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of distributing a Schedule I controlled substance, Lysergic Acid Diethylamide, in violation of Utah Code Annotated, 58-37-8(1)A(a)(ii) (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried and convicted by a jury on November 20, 1980 in the Fourth Judicial District Court of Utah, the Honorable George E. Ballif, presiding. Pursuant to his conviction, appellant was sentenced on December 12, 1980 to an indeterminate term of up to five years in the Utah State Prison and fined $500.00. However, appellant's prison sentence was suspended and he was placed on a two-year probation.

RELIEF SOUGHT ON APPEAL

Respondent requests that this Court affirm the judgment and sentence of the trial court.

STATEMENT OF THE FACTS

On March 5, 1981, Officer Jeff Winn, an undercover narcotics agent for the Pleasant Grove Police Department, purchased two tablets of L.S.D. from appellant for $6.00 (T. 17). Officer Winn had met appellant and some friends of appellant's at approximately 8:25 that evening at the Beacon Cafe in Lindon, Utah (T. 14-16). Officer Winn had been waiting for Doug Aston, who was going to sell him some marijuana, when appellant and Gary Marchbanks came out of the cafe and got in Officer Winn's car (T. 16). Soon thereafter, Mr. Aston returned with the marijuana. During the conversation that ensued, appellant asked if anybody wanted to buy some "acid" (T. 16).

Officer Winn agreed to purchase some L.S.D. from appellant for $6.00, which he paid in the Beacon Cafe parking lot (T. 17). After giving appellant the money, Officer Winn drove Doug Aston, Gary Marchbanks, and appellant, according to appellant's instructions, to a four-plex in Orem where appellant obtained the tablets of L.S.D. and gave them to Officer Winn (T. 17). The following morning the tablets were turned over to Officer Tom Paul of the Pleasant Grove Police

Department, who sent them to the State Health Lab for tests (T. 24). The tests confirmed that the tablets were L.S.D. (T. 29).

On or about the 16th of June, 1980, Officer Winn, after being released as an undercover agent, assisted in the arrest of appellant at appellant's home in Pleasant Grove (T. 21).

Prior to appellant's trial he made a motion to supress the evidence obtained by Officer Winn in Orem. This motion was denied by Judge Ballif (R. 12, 13). At trial appellant presented an alibi defense to show that he had not been at the Beacon Cafe on March 5, 1980, but that he had been celebrating a birthday with his brother. Appellant called as witnesses his sister, Cindy (T. 58), and his brother, Ben (T. 42), to corroborate his story. Also testifying in behalf of appellant was Gary Marchbanks, who stated that he did not go with appellant and Officer Winn on the night of the 5th (T. 89). After presenting Mr. Marchbanks' testimony, counsel for appellant indicated he had a few more witnesses (T. 95); however, after a moment defense counsel rested, indicating that the other witnesses were not present (T. 95). No request was made at this time for a continuance, nor did the defense counsel explain to the court the nature of the testimony these witnesses would have given.

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED HIS RIGHT TO COMPULSORY PROCESS.

Before examining the merits of appellant's claim that he was denied his right to compulsory process, respondent submits that there are a number of procedural issues that should be considered. First, this Court has consistently held that it will not hear issues raised for the first time on appeal. State v. Kelsey, 532 P.2d 1001 (Utah 1975). In Simpson v. General Motors Corporation, 24 Utah 2d 301, 470 P.2d 399 (1970), this Court said:

> Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round of litigation. Id. at 401.

An examination of the record in the instant case discloses that appellant failed to raise this issue at trial. The record reveals that appellant's counsel, near the end of the defense, anticipated having a few more witnesses (T. 95); however, upon discovering that the witnesses were not present, appellant's counsel rested (T. 95). There is no indication that appellant requested a continuation to secure the

presence of his witnesses at trial, or that the court refused to allow the testimony of appellant's witnesses on the grounds that the testimony was cumulative. No offer was made concerning anticipated testimony of the witnesses; therefore respondent submits that appellant's failure to request a continuance or to make an objection precludes him from claiming that he has been denied compulsory process on appeal.

The second procedural issue, which becomes apparent upon reading appellant's brief, is that appellant cites a number of facts not contained within the record. There is no indication in the record that six subpoenas were delivered to the Utah County Constable, or that the Constable delivered some of the subpoenas 12 hours late. In addition, appellant's reference to the trial court's ruling that the testimony of the additional witnesses was merely cumulative is nowhere to be found in the record (appellant's brief, page 4). Finally, even though the record indicates there was a previous trial and that some of the witnesses who testified at the first trial did not testify at the second (R. 4), there is no way of telling what their testimony was or the effect it may have had on the jury.

It is fundamental that an appeal is limited to the proceedings in the lower court upon which the Judgment is based. U.R.C.P., Rule 75. In Tucker Realty Inc. v.

Nunley, 16 Utah 2d 97, 396 P.2d 410 (1964), this Court stated in response to an attempt to supplement the record with evidence which was not part of the lower court proceedings:

> It requires but a moment's reflection to realize what a chaotic situation would exist if after a judgment is entered and an appeal taken, the parties could keep on having supplemental proceedings, adducing new evidence, and forwarding the transcripts to the Supreme Court. The illogic and irregularity of attempting to do so is so obvious that further comment as to its impropriety is unnecessary. Id. at 413, 414.

Respondent submits that the facts cited by appellant in Point I of his brief are not properly before this Court. Respondent further submis that it has no access to these facts and therefore cannot verify their accuracy. For these reasons this Court should not reach the merits of appellant's claim that his right to compulsory process has been denied unless appellant properly presents a complete record to this Court.

If there are omissions in the record or if appellant has newly discovered evidence, there are alternative remedies he can pursue. Under the Utah Rules of Civil Procedure, Rule 75(h) errors or omissions in the record can be corrected. Rule 75(h) provides in part:

> If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or

> the district court, either before or after the record is transmitted to the Supreme Court, or the Supreme Court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the Supreme Court.

Respondent submits that if there has been an omission in the record, appellant should comply with the provisions of Rule 75(h).

A second remedy available to appellant, if he has discovered new evidence, is found in Utah Code Annotated, §75-35-24, (1953), as amended. Rule 24 of the Utah Rules of Criminal Procedure provides that a new trial may be granted "in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." If appellant discovered after his trial that some of his witnesses were not present at trial because the Utah County Constable failed to timely deliver the subpoenas and that this, in fact, prejudiced him, then appellant should make a motion for a new trial. Further remedies available to appellant include petitioning for a Writ of Habeas Corpus or a Writ of Coram Nobis under Rule 65B of the Utah Rules of Civil Procedure.

Before addressing the merits of appellant's claim, respondent again points out the difficulty in making an argument when there is no way to verify the accuracy of appellant's allegations; however, even assuming the facts stated by appellant are true, respondent submits the trial court acted properly. Appellant states that persons unrelated to appellant did not testify at his second trial because of a constable's failure to timely serve them with a subpoena. Appellant also infers that he made a request at trial that would have enabled him to admit the testimony of these witnesses, but that this request was refused on the grounds that the testimony was cumulative (appellant's brief, page 4). Respondent agrees that appellant has the right to compulsory process; however, appellant's right to present competent evidence at trial is subject to the trial judge's discretion to exclude admissible evidence if the judge finds that the probative value of the evidence is substantially outweighed by the risk that its admission will cause any of the following problems:

> (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

Rule 45 of the Utah Rules of Evidence.

In this case numerous witnesses at trial testified that appellant was not with Officer Winn on March 5, 1980, the night Officer Winn purchased the L.S.D. from appellant. They claim that appellant on that night was at another bar celebrating his birthday with his brother, Ben (See the testimony of Elmer Benson Long, T. 42; Cindy Marie Stowe, T. 58; Jerry Long, T. 66; and Gary Marchbanks, T. 85). Appellant indicates in his brief that the other witnesses would have also testified that appellant was at a different location on March 5, 1980 than the location alleged by the state (appellant's brief, page 4). It is true that this additional testimony may have added a dimension to appellant's alibi defense; nevertheless, in view of the fact that numerous witnesses had testified that appellant was not with Officer Winn on March 5, 1980, the probative value of additional testimony was outweighed by the risk that a great deal of time would be consumed in granting a continuance to secure the presence of the additional witnesses at trial.

Appellant argues that proof that he was prejudiced by the absence of these additional witnesses is established by the fact that he was not convicted with their testimony at his first trial, but was convicted without their testimony at his second trial. The fallacy of this argument is obvious. It is impossible to conclude from these facts that appellant's

conviction in his second trial was caused by the absence of the additional witnesses. Many other factors could have intervened and resulted in his conviction. First, at appellant's second trial he was tried by a new set of jurors. Second, at the second trial there might have been numerous differences in the appearance and demeanor of those who testified which may have affected their credibility. Third, the strategies and arguments made by counsel for both sides might have been different in the second trial. Therefore, respondent submits that appellant's conviction at his second trial does not establish that the trial court abused its discretion in excluding the additional testimony.

Respondent submits that even if the exclusion of this additional testimony was error, this still would not be a basis to reverse appellant's conviction. Rule 5 of the Utah Rules of Evidence provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

In this case appellant provided substantial testimony to corroborate his alibi defense; however, the jury chose to believe the police officer over the witnesses who testified on appellant's behalf. There is no reason to believe that the additional testimony would have changed this result. Therefore, respondent submits that appellant was not prejudiced.

POINT II

THE EVIDENCE OBTAINED BY OFFICER WINN IN OREM WAS PROPERLY ADMITTED AT TRIAL.

Appellant argues that Officer Winn exercised his authority outside the territorial limits of his jurisdiction and therefore the evidence he obtained by such action should not have been admitted at trial. Appellant unsuccessfully moved to suppress this evidence on this ground. Respondent argues that on March 5, 1981 Officer Winn was working as an undercover narcotics agent for the Pleasant Grove Police Department, and that he consummated a drug sale in Orem which had begun within Officer Winn's jurisdiction. However, respondent submits that the authorities cited by appellant are not applicable to the facts of the instant case, that Officer Winn acted properly under the circumstances, and that the evidence obtained by Officer Winn in Orem was properly admitted at trial.

Utah Code Annotated, Section 77-13-36 (1953), as amended, which was in effect on March 5, 1981, gave police officers the authority to act outside their normal jurisdictions in certain circumstances. This statute was enacted to promote cooperation between the various law enforcement agencies of this state and to protect local law enforcement agencies from liability arising from the actions of intruding police officers within the local jurisdiction. This purpose is manifest in the last line of subsection 2, which provides:

> Unless specifically requested to aid a police officer of another jurisdiction or otherwise as provided for by law, no legal responsibility for a police officer's actions outside his normal jurisdiction and as provided herein, shall attach to the local law enforcement authority.

Nothing in this statute refers to the admissibility of evidence obtained by police officers outside their own jurisdiction. Therefore, since this statute was designed to promote effective law enforcement and not to confer rights upon defendants in criminal proceedings, respondent submits that the trial court properly denied appellant's motion to suppress the evidence (R. 12, 13).

Furthermore, Officer Winn's participation in the drug "buy" did not require or involve the exercise of his

authority as a peace officer. This could have been accomplished by a private citizen or an informant who had no peace officer powers. Since Officer Winn did not make an arrest in Orem, he was not exercising his authority as a peace officer in that jurisdiction and thus the statute does not apply at all.

Even if this Court finds that the statute applies to this case, the conduct of Officer Winn in exercising peace officer authority beyond his own jurisdiction was justified under §77-13-36(b) since the offense was ongoing in each jurisdiction and was in fact "committed" in Officer Winn's presence in Orem.

Appellant also asserts that Officer Winn's conduct outside his jurisdiction was controlled by Utah Code Annotated, §77-7-3 (1953), as amended. Section 77-7-3, which is essentially the same as Utah Code Annotated, §77-13-4 (1953), as amended, (which was in effect when these events occurred) provides:

> 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 been in fact committed and he has reasonable cause for believing the person arrested to have committed it.

The following reasons establish that this statute has no application to the instant case. First, this statute applies to arrests made by private persons. In the instant case appellant was arrested in Pleasant Grove three months after the drug sale (T. 21). Therefore, since the arrest took place in Officer Winn's jurisdiction, he was not acting as a private person when he made the arrest, but was acting in his official capacity as a police officer.

Second, this statute provides that private persons can only make arrests under certain conditions; however, it does not require that those conditions exist before a private person can take any action. For example, a private person can take down a license plate number, get a description, or notify the police without first knowing that a felony has been committed. To hold that a private person could only assist the police when the conditions set forth in the statute are present would substantially hinder law enforcement. Third, the purpose of this statute is to protect private citizens from civil liability arising from false arrest, and to proscribe the dangers of uncontrolled vigilantism. Its purpose is not to frustrate legitimate law enforcement activities. Com v. Harris, 415 N.E. 2d 216 (Mass. 1981).

Some of these considerations distinguish People v. Aldapa, 17 Cal. App. 3d 184, 94 Cal. Rptr. 579 (1979) from

the instant case. In Aldapa, the court held that the defendant had been illegally arrested and therefore the evidence obtained pursuant to the arrest was inadmissible at trial. The court found that the officers who made the arrest outside their jurisdiction were acting as private persons. Therefore, the validity of the arrest was determined under §837 of the California Penal Code, which provided for arrest by private persons. Section 837 stated that a private person may make an arrest "when a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it." In Aldapa the defendant was charged with possession and possession of a narcotic for sale. The court noted that the police officers had arrested the defendant prior to discovering a bag of heroin he had in his possession. Therefore, the arrest was not valid under §837 because the police officers were not aware that a crime had been committed until after the arrest had been made.

In Aldapa the evidence was inadmissible because it had been obtained as the result of an illegal arrest. In the instant case appellant does not challenge the validity of his arrest. Therefore, he cannot claim that the evidence obtained by Officer Winn in Orem was inadmissible because it was obtained pursuant to an illegal arrest. The logical inference, then, from appellant's argument is that Aldapa

stands for the proposition that any evidence obtained by a private person before he/she knows the defendant has committed a crime is inadmissible. Respondent submits that Aldapa is not subject to such a broad interpretation.

Appellant further asserts that Officer Winn's conduct was unauthorized and therefore illegal. Respondent submits that Officer Winn's conduct was authorized. Utah Code Annotated, §77-36-4 provides that a police officer can exercise his authority outside his normal jurisdiction in response to public offenses committed in his presence. The public offense committed by appellant in this case was the distribution of a controlled substance for value. Appellant offered to sell L.S.D. to Officer Winn, took six dollars from Winn for the drug, and gave Officer Winn two tablets of L.S.D. (T. 16, 17). Appellant obviously committed the offense in Officer Winn's presence and therefore Officer Winn's conduct was authorized. Furthermore, even assuming that Officer Winn's actions were unauthorized, that does not mean his acts were illegal.

Officer Winn's conduct in the instant case was not like that taken by the police in Aldapa, who conducted numerous surveillances of the defendant's house for a three-month period and eventually arrested the defendant without ever notifying the local authorities. Here Officer Winn did

not have time to notify Orem officials once the buy began. The only alternative to the course of action he took was to refuse to go to Orem to get the L.S.D. This not only would have caused the sale to fall through, but it might have blown Officer Winn's cover as well. Certainly the legitimate concerns of law enforcement justify Officer Winn's actions in this case. See Com. v. Harris, 415 N.E. 2d 216 (1981). If appellant's view as to the operation of the statute were adopted, no police officer in a case such as this, where the commission of a crime begins in one jurisdiction and culmiates in another, could follow the defendant into the other jurisdiction to allow the crime to be completed. Defendants in such a situation could undertake drug sales with impunity merely by making the exchange in a different jurisdiction than the one in which the original contact is made. Such a burden on law enforcement is clearly not contemplated by the statute. In consideration of these facts respondent submits that Officer Winn acted properly and that the evidence he obtained was properly admitted at trial.

CONCLUSION

Appellant claims that he was denied his right to compulsory process at trial; however, appellant did not raise this issue in the lower court, and therefore he cannot raise

it for the first time on appeal. As part of his argument, appellant refers to many facts which cannot be found in the official record. Respondent submits that before this Court considers the merits of appellant's claim, appellant should follow established procedures to correct or supplement the record if it contains mistakes or omissions. Even if this Court should decide to reach the merits of this issue, respondent submits that the trial court properly excluded the testimony of appellant's additional witnesses under Rule 45 of the Utah Rules of Evidence and that the admission of the evidence would not have had a substantial influence on the verdict.

Appellant's second claim is that evidence obtained by Officer Winn outside the limits of his jurisdiction should have been suppressed at trial; however, §77-13-4 was not designed to frustrate law enforcement, but to promote it through orderly cooperation between the various law enforcement authorities. Respondent submits that Officer Winn complied with §77-13-4, that he acted reasonably, and did not violate any of defendant's rights.

Therefore, the trial court properly admitted the evidence.

DATED this 6th day of October, 1981.

Respectfully submitted,

DAVID L. WILKINSON
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Robert N. Parrish

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief to Philip G. Jones, attorney for appellant, McCullough & Jones, 930 South State Street, Suite 10, Orem, Utah, 84057, this 6th day of October, 1981.

Robert N. Parrish