

1956

State of Utah v. John F. Ledkins : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

UNIVERSITY UTAH

JAN 28 1957

STATE OF UTAH,
Plaintiff and Respondent,

LAW LIBRARY

— vs. —

Case
No. 8537

JOHN F. LEDKINS,
Defendant and Appellant.

FILED
OCT 26 1956

Clerk Apr Court, Utah

Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

JOHN F. LEDKINS,
Defendant and Appellant.

Case
No. 8537

Brief of Respondent

STATEMENT OF FACTS

The Statement of Facts presented in appellant's brief is substantially true and respondent adopts it for purposes of its argument herein.

STATEMENT OF POINTS

POINT I

THE APPELLANT IS PROPERLY CHARGED
WITH A STATUTORY OFFENSE.

POINT II

THE APPLICATION OF SECTIONS 64-9-38
AND 64-9-41, UTAH CODE ANNOTATED 1953,
TO THE APPELLANT IS CONSTITUTIONAL
AND HE HAS NO STANDING TO COMPLAIN
OF POSSIBLE UNCONSTITUTIONAL AP-
PLICATIONS OF OTHER PARTS OF THOSE
STATUTES.

POINT III

THE LEGISLATURE HAS MADE THE OF-
FENSE CHARGED A FELONY.

ARGUMENT

POINT I

THE APPELLANT IS PROPERLY CHARGED
WITH A STATUTORY OFFENSE.

Our code of criminal procedure contains a provision
to the effect that an accused may be bound over on an
offense different from that originally set forth in the
complaint. Section 77-15-19, Utah Code Annotated 1953,
reads:

“If it appears from the examination that a public offense has been committed and that there is sufficient cause to believe the defendant guilty thereof, the magistrate must indorse on the complaint an order, signed by him, to the following effect: ‘It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within named A B guilty thereof, I order that he be held to answer to the same.’ ”

In this case the appellant was charged originally with wilfully and knowingly violating the rules and regulations of the Utah State Prison while employed there as a guard. At the preliminary hearing, prior to the taking of any testimony, the complaint was amended by the addition of a count charging him with attempting to wilfully and knowingly supply drugs to an inmate while employed as a guard at the prison. On the reverse side of the complaint, the committing magistrate indorsed that the appellant was held to answer to “the offense in the within complaint.” The court’s entry on March 15, 1956, shows that the first count was dismissed and that it was necessarily the second count which charged the offense on which the appellant was bound over. The evidence in the preliminary hearing, then, shows “sufficient cause” to believe that an offense — the attempt to wilfully and knowingly supply drugs to an inmate while employed as a guard at the Utah State Prison — had been committed and that the appellant was the person who committed it.

An information was then filed erroneously charging the appellant in the language of the dismissed count. At the hearing on appellant's Motions to Quash and to Dismiss, it was agreed that an amended information would be filed correcting the error, and the motion was argued as if that had previously been done (R. 26-27). Section 77-17-3, Utah Code Annotated 1953, permits amendment of an information at any time before the plea is entered, and the appellant has no basis for objection herein on that point.

He does object, however, to the language of the amended information. Where the count on which he was bound over says, “* * * did wilfully and knowingly attempt to *supply* drugs * * *” the amended information says “* * * the crime of attempting to *give or sell* drugs * * *”. (Italics supplied) This court is asked to hold that this is fatal to the prosecution herein.

While the cases hold that an information generally is sufficient if it charges an offense in the language of the statute, e.g., *State v. Stuhr*, 96 P. 2d 479 (Wash. 1939), they do not hold that the exact statutory language is a necessity. On the contrary, language substantially similar to the wording is sufficient. *Sparkman v. State* 93 P. 2d 1095, (Okla. 1939); *People v. Jarvis*, 27 P. 2d 77 (Cal. App. 1933). In *Midkiff v. State*, 30 P. 2d 1057, at page 1058 the Arizona Supreme Court said:

“A comparison of the language of the information with the wording of the statute shows that they are substantially the same. This is all that is required, especially where the offense is statutory, as here. (cases cited)”

And the language of *Commonwealth v. Greene*, 98 A. 2d 202 (Pa. 1953) is appropriate to the facts of this case. The Pennsylvania Supreme Court said:

“It is not essential that the information be couched in the precise language of the statute, if the words used have substantially the same meaning. *Commonwealth v. Friedlander*, 53 Pa. Super. 221. Failure to properly support, as charged, is the precise equivalent of neglecting to maintain within the contemplation of § 733 of the Act. Cf. *Commonwealth v. George*, 358 Pa. 118, 123, 56 A. 2d 228, where similar terms are used interchangeably. Contrary to appellant’s contention, no one could have been misled to conclude that the information intended to charge the defendant with the indictable misdemeanor defined in § 731 of the Act, 18 P. S. § 4731.”

Although in this case it is the statement of the offense on which the appellant was bound over, rather than the information, which does not follow the exact language of the statute, the rationale of the above cited cases would seem to apply by necessary implication. What is important is that the appellant not be misled as to the charge he must defend against, and there can be no question that the language of the second count in the complaint apprised this appellant and his counsel, that the offense he was bound over on is the same crime charged in the language of the amended information.

This conclusion is supported by the definitions of *give* and *supply* found in Webster’s new International Dictionary, second edition:

“GIVE

* * * 3. To deliver or transfer (to another something that is taken by him). * * * Syn.—Supply, * * *,”

“SUPPLY

* * * 6. To furnish or provide. Specif.: (a) to give (something desired, needed, etc.); * * *”

Commonwealth v. Davis, 75 Ky. 24, 241 (1876), held that the word *give* should not be limited to a strict meaning of transfer without consideration, where used in an indictment for violation of the liquor laws of Kentucky. The court said:

“In its strict and primary sense the word ‘give’ signifies ‘to confer or transfer without any price or reward; to bestow.’ In its more enlarged sense it signifies ‘to furnish, to supply’; and it was in this latter sense the word was used in the statute.”

The foregoing authorities show clearly that there is no substance to the appellant’s contention that he received no preliminary hearing on the offense charged in the information.

POINT II

THE APPLICATION OF SECTIONS 64-9-38 AND 64-9-41, UTAH CODE ANNOTATED 1953, TO THE APPELLANT IS CONSTITUTIONAL AND HE HAS NO STANDING TO COMPLAIN OF POSSIBLE UNCONSTITUTIONAL APPLICATIONS OF OTHER PARTS OF THOSE STATUTES.

This appeal is taken at a point in the proceedings against the appellant at which he stands charged by

an amended information of the statutory offense of attempting, while employed as a guard at the Utah State Prison, to wilfully and knowingly, give or sell drugs to an inmate of the prison. The offense is made out by reading together Sections 64-9-41 and 64-9-38, Utah Code Annotated 1953, and applying our statute on attempts, Section 76-1-30.

Section 69-941 says, among other things, that no drug shall be given to any convict in the prison except by the prison physician and then only if the convict is ill. Section 64-9-38, Utah Code Annotated 1953, so far as pertinent, reads as follows:

“ * * * Any guard, keeper or other employee of the state prison who knowingly violates any rule or regulation adopted by the board, or who violates any of the provisions of this chapter, or who neglects to perform the duties required of him by the rules and regulations of the prison or by the provisions of this chapter, is guilty of a felony, and may be punished by a fine not exceeding \$1,000 or by imprisonment in the state prison for a period not exceeding three years, or by both such fine and imprisonment.”

That the appellant was at first charged under another part of Section 64-9-38 and that such other part of the section is of doubtful constitutionality, even if true, matters not at all at this point. The appellant has no standing to challenge in this court possible unconstitutional applications of a statute resulting from an active imagination and having no basis in fact with respect to him. It is a basic concept of constitutional law

that a party cannot raise conjectural issues having no relation to the facts in the matter at bar. 11 Am. Jur. Constl. Law, Sec. 111, states in part:

“It has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the determination of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character. * * *

“One cannot invoke, in order to defeat a law, an apprehension of what might be done under it and which, if done, might not receive judicial approval; to complain of a ruling one must be the victim of it. * * *

“These principles apply fully to criminal proceedings. * * * An accused cannot raise the question of the constitutionality of a statute which is not the basis of the prosecution against him. Thus, a defendant charged with the violation of a statute, but not charged with any act coming under a certain severable section of the statute, is without the interest necessary to question the validity of that section. * * *

To the same effect are *United Public Workers v. Mitchell*, 330 U. S. 75 (1947); *Kay v. United States*, 303 U. S. 1 (1938); *Coffman v. Breeze Corporations*, 323 U. S. 316 (1945) and *Shinn v. Oklahoma City*, 87 P. 2d 136 (Okla. 1939).

Appellant maintains that the statute in question is not severable and that this case therefore comes within the sometime-recognized exception to the above general rule that where an act is indivisible, a party may

successfully attack its invalid portions even though they do not affect his rights. Even if this exception were held to be the law in Utah, we see no basis for its application in this case. The part of the section to which appellant objects is that which makes a violation of the prison rules and regulations a felony. But it is not shown how this relates to the part making a violation of the provisions of Chapter 9 a crime, and there apparently is no relationship. The deletion of the alleged invalid provisions by no stretch of the imagination disembowels this statute. Under the remaining language there are left sixty-three separate sections of Chapter 9, Title 64 to be enforced, all of them definite, clear statements of the legislative will.

The test, according to Sutherland Statutory Constitution, 3rd edition, Section 2404 “* * * is whether or not the legislature would have passed the statute had it been presented with the invalid features removed.” Quoting further in the same section, “In statutes not containing a separability clause, the independence of the valid portion of a statute will be a principle indicia of the legislative intent that a statute be separately enforced.” It is true that in borderline cases, criminal statutes are sometimes put to a more stringent severability test than are civil statutes, Sutherland, Section 2418, 11 Am. Jur, Constitutional Law, Section 166, but this is not a borderline case. The wording of the section applicable to the appellant in this case leaves no doubt that it stands independent of the alleged unconstitutional portions. Where that is so, the remaining

provisions must be given effect. 11 Am. Jur. Constitutional Law 152. *Smith v. Carbon County*, 81 P. 2d 370 (Utah 1938).

POINT III

THE LEGISLATURE HAS MADE THE OFFENSE CHARGED A FELONY.

Chapter 9 of Title 64, Utah Code Annotated 1953, deals with the Government of the Utah State Prison and Section 64 thereof makes a violation of any of its provisions by any person, firm, or corporation a misdemeanor. Section 38 singles out guards or keepers, and says that if any such shall violate any provision of the chapter he is guilty of a felony. This arrangement of penal provisions is in accordance with the recommendation of Sutherland, *supra*, at Section 4826, where he states:

“The better practice is to place a general penalty section at the end or near the end of the act and provide that any violation of the provisions of the act is punishable according to the terms of the penalty section. If it is desirable to punish some acts more severely than others, by the increased penalties for the violation of particular provisions, the increased penalties should be added as separate sections immediately following the general penalty section. In this way the legislative intent is clearly expressed. Occasionally, it is justifiable to include particular penalty provisions at the place in the statute where the prohibited act is specified, but as a general rule the inclusion of the penalties at the end of the statute permits

a more orderly development of the legislative regulation and creates a clearer picture of the liabilities which the act specifies.”

No reason appears why effect may not be given to both provisions of this statute. *Western Beverage Co. of Provo v. Hansen*, 96 P. 2d 1105 (Utah 1939), *State v. Gates*, 221 P. 2d 878 (Utah 1950). The two provisions are in no way conflicting, and each can be given its proper application by following the rule that where two statutory provisions deal with the same subject matter, one being specific and the other general in its treatment, the specific provision controls the general. *Salt Lake City v. Salt Lake County*, 209 P. 207 (Utah 1922) and cases there cited; *State ex rel Public Service Commission v. Southern Pacific Company*, 79 P. 2d 25 (Utah 1938).

CONCLUSION

The appellant is properly charged with a statutory offense which violates no provision of our Constitution and on which he has been given a proper preliminary hearing. This appeal should be dismissed and the matter returned to the District Court for trial on the merits.

Respectfully, submitted,

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