1982

State of Utah v. Charles Kermit Lesley : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18038
CHARLES KERMIT LESLEY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the judgment and conviction of Production of a Controlled Substance and Criminal Trespass rendered by the Third Judicial District Court in and for Salt Lake County, the Honorable Peter F. Leary, Judge, presiding.

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STATEMENT OF THE NATURE OF THE CASE

Appellant, Charles Kermit Lesley, was charged with Production of a Controlled Substance (to wit, cultivation of marijuana), a felony, under Utah Code Ann., § 58-37-8 (1)(a)(i) (1953), as amended; and with Criminal Trespass, a class C misdemeanor, under Utah Code Ann., § 76-6-206 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of both charges after a jury trial on August 13 and 17, 1981 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding. On September 23, 1981, appellant was sentenced to imprisonment at the Utah State Prison for an indeterminate term not exceeding five years and fined $900.00 for the felony offense; and was

sentenced to imprisonment at the Utah State Prison for an indeterminate term not exceeding 90 days and fined $299.00 for the misdemeanor offense--the sentences to run concurrently. A stay of execution of the above sentence was granted and appellant was placed on conditional probation.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the trial court.

STATEMENT OF THE FACTS

Red Butte Canyon, located in Salt Lake County a short distance due east of the University of Utah, is a rugged area charactrized by steep terrain, dense brush, and a large population of rattlesnakes (T. 5, 7, 8). On August 21, 1980, it was a no-trespass, entry-by-permission-only[1] area controlled by the United States Forest Service (U.S.F.S.). A single road with three locked gates, the first of which displayed no-trespassing signs, provided the only access for vehicles into the canyon. There were no designated trails for public use in the area, and people were not commonly seen there (T. 6, 13, 14, 15, 16).

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[1]Access to Red Butte Canyon was limited to U.S.F.S. personnel, persons with permission from the Forest Service (generally, these persons were research workers from the University of Utah), and 100 deer hunters in October (T. 6).

On that same date, Steve Alexander, a Salt Lake County deputy sheriff, entered Red Butte Canyon with approximately ten other officers and Gene Lowin, a forest technician who had been permanently employed by the U.S.F.S. for three years and was familiar with the canyon and its use. Their purpose was to seize marijuana plants and items related to its cultivation in a "farm" compound which had been detected in the area and investigated at an earlier date (T. 4, 9, 26, 27). At a distance of approximately one-quarter mile, Officer Alexander observed appellant walking in the immediate area of the compound. Shortly thereafter, Alexander arrived at the compound and found appellant nearby (T. 29, 30) (no other individuals were found (T. 12, 57)). After asking appellant for some identification and to explain his presence in the area, and having been informed by Gene Lowin that appellant was trespassing, Officer Alexander placed appellant under arrest (T. 53).[2] Several items of evidence were seized during a search of appellant and his pack conducted pursuant to the arrest (T. 31-45).

On February 6, 1981, appellant filed a pre-trial motion in the district court, Judge Jay Banks, presiding, to

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[2]It should be noted that Alexander's testimony at trial indicated that he didn't recall exactly whether, before he arrested appellant, he had asked for identification and an explanation of appellant's presence in the area. However, his testimony did indicate that he had been informed by Lowin of appellant's trespasser status before the arrest was made (T. 31, 53).

suppress the evidence seized from his pack. His memorandum in support of that motion asserted that Officer Alexander did not have probable cause to arrest him, and thus the evidence seized should not be admissible at trial (R. 12-18). The district court denied the motion. During his trial on August 14 and 17, 1981, at which Judge Peter Leary presided, appellant raised no objection to the admission of that evidence or of any other evidence offered by the prosecution (T. 88, 100). The jury found him guilty of both criminal trespass and production of a controlled substance (R. 41, 42).

ARGUMENT

POINT I

THE EVIDENCE OBTAINED PURSUANT TO A SEARCH INCIDENT TO APPELLANT'S ARREST WAS PROPERLY ADMITTED AT TRIAL.

A. BECAUSE APPELLANT FAILED TO OBJECT AT TRIAL TO THE ADMISSION OF THE EVIDENCE NOW CHALLENGED ON APPEAL, HE IS PRECLUDED FROM RAISING THE ISSUE ON APPEAL.

Although appellant filed a pre-trial motion to suppress the evidence seized from his pack pursuant to a search conducted after his arrest, the admission of which he now challenges on appeal, he failed to raise an objection at trial; thus, the issue was not preserved for consideration on appeal. In fact, the record indicates that appellant

consented to admission of the evidence. At T. 88, the following dialogue appears:

> Mr. Christensen (Prosecutor): At this time, your Honor, I believe that Mr. Long has had a chance to review the exhibits and I would offer Exhibits 1-P through and including 35-P.[3]
>
> The Court: Have you examined the photographs?
>
> Mr. Long (Appellant's attorney): I have, your Honor. I have no objection to the introduction of them in evidence.
>
> The Court: Exhibits 1 through 35 will be admitted.

Rule 4, 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 admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection, and (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding. However, the court in its discretion, and in the interests of justice, may review the erroneous admission of evidence even though the grounds of the objection thereto are not correctly stated.

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[3]Exhibits 1-P through 35-P included the evidence seized from appellant's pack.

Recently, in State v. McCardell, Utah, 652 P.2d 942 (1982), this Court made clear what effect a defendant's failure to comply with the "contemporaneous objection" requirements of Rule 4 would have on assignments of error made on appeal. In holding that McCardell's failure to interpose a timely and specific objection to the admission of several "mug shots" precluded consideration on appeal of his arguments respecting that issue (even though his "arguments on [that] point clearly ha[d] merit," 652 P.2d at 946), the Court said:

> We endorse the following statement made by the Kansas Supreme Court in [State v. Moore, 218 Kan. 450, 543 P.2d 923 (1975)]:
>
> "The contemporaneous objection rule long adhered to in this state requires timely and specific objection to admission of evidence in order for the question of admissibility to be considered on appeal. The rule is a salutory procedural tool serving a legitimate state purpose. By making use of the rule, counsel gives the trial court the opportunity to conduct the trial without using the tainted evidence, and thus avoid possible reversal and a new trial. Furthermore, the rule is practically one of necessity if litigation is ever to be brought to an end."
>
> 543 P.2d at 927, quoting Baker v. State, 204 Kan. 607, 611, 464 P.2d 212, 216 (1970).

652 P.2d at 947. See also: State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965). The same considerations apply here. Thus, appellant's failure to interpose any objection, which thereby denied the trial court an opportunity to address his

concerns, should have the same consequences such inexcusable procedural default had in State v. McCardell, supra--a refusal by this Court to consider the evidence issue on appeal. As Justice Powell stated in Estelle v. Williams, 425 U.S. 501 (1976),

> [T]here are two situations in which a conviction should be left standing despite the claimed infringement of a constitutional right. The first situation arises when it can be shown that the substantive right in question was consensually relinquished. The other situation arises when a defendant has made an "inexcusable procedural default" in failing to object at a time when a substantive right could have been protected.

Id. at 513-514 (concurring opinion) (emphasis added).

A further issue must also be addressed. Utah Code Ann., § 77-35-12 (1980) provides for the filing of pre-trial motions to suppress evidence, like that which was filed in appellant's case. There is a split of authority concerning the issue of whether a defendant whose pre-trial motion to suppress has been denied must again raise an objection to the evidence at trial in order to preserve the issue for appeal. However, given the policy considerations expressed by this Court in State v. McCardell, supra, and State v. Smith, supra, the following rule as stated by the Texas Court of Criminal Appeals in Romo v. State, Tex. Cr. App., 577 S.W.2d 251 (1978)

is most consistent with those considerations and should be adopted in Utah:

> [R]eliance on a motion in limine will not preserve error. A defendant must object on the proper grounds when the evidence is offered at trial. Harrington v. State, 547 S.W.2d 643 (Tex.Cr.App. 1976). The reason for this rule is that a judge is often not in a position to decide on the admissibility of evidence prior to the beginning of trial. This is particularly true when the objection is based on grounds such as the failure to prove a proper predicate. Counsel could ask in the motion in limine that before a suspect area is entered into at trial, the opposing counsel be required to approach the bench and inform the court so that the jury may be excluded. By that procedure the evidence may be challenged at the proper time without risk of prejudicing the jury. Whatever the procedure chosen, defense counsel must object before the evidence is admitted during trial in order to properly call the court's attention to the matter and preserve the error for appeal.

577 S.W.3d at 252. See also: State v. Hinsey, Iowa, 200 N.W.2d 810 (1972); Jackson v. State, 108 Ga. App. 529, 133 S.E.2d 436 (1963). However, cf. United States v. Hopkins, 433 F.2d 1041 (5th Cir. 1970) and Sacramento and San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963), which are contra.

The above rule is particularly applicable where, as here, the judge ruling on the pre-trial motion to suppress is not the same judge who presides at trial. By failing to

object, appellant denied the trial judge an opportunity to consider appellant's arguments against admission of the evidence; and, in fact, gave the trial judge the impression that he consented to its admission after being specifically asked if he had any objections (T. 88). Given these facts, appellant has absolutely no grounds to appeal.

B. OFFICER ALEXANDER HAD PROBABLE CAUSE TO ARREST APPELLANT; THUS, THE EVIDENCE SEIZED WAS PROPERLY ADMITTED AT TRIAL.

Even if this Court decides to consider the evidence issue, appellant's assignment of error is without merit. Appellant argues that under the circumstances of his case, his arrest was made without probable cause, was therefore illegal, and the evidence obtained pursuant to a search incident to that arrest should have been suppressed prior to trial. In short, his suppression argument is based solely on the alleged illegality of the arrest.

Appellant correctly notes that the Utah Supreme Court has adopted the Beck v. Ohio, 379 U.S. 89 (1964), standard concerning what constitutes probable cause for arrest without a warrant. State v. Whittenback, Utah, 621 P.2d 103 (1980); See also: State v. Hatcher, 27 Utah 2d 318, 495 P.2d 1259 (1972). In Whittenback, this Court affirmed the Beck standard as follows:

> The determination should be made on an objective standard: whether from the facts known to the officer and the inferences which fairly might be drawn therefrom, a reasonable and prudent person in his position would be justified in believing that the suspect had committed the offense.

621 P.2d at 106, citing State v. Hatcher, supra. As also noted by appellant, this same basic standard is reflected in Utah Code Ann., § 77-7-2 (1980). Subsection (3) of that section provides that a peace officer may make an arrest without a warrant:

> When he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may:
> (a) Flee or conceal himself to avoid arrest;
> (b) Destroy or conceal evidence of the commission of the offense; or
> (c) Injure another person or damage property belonging to another person.

In State v. Eastmond, 28 Utah 2d 129, 499 P.2d 276 (1972), this Court interpreted the language of subsection (3) as follows:

> In performing his duties as authorized by this statute, a police officer is not required to meet any such standard of perfection as to demand an absolutely certain judgment before he may act. The test to be applied is one which is reasonable and practical under the circumstances: whether a reasonable and prudent man in his position would be

> justified in believing facts which would warrant making the arrest. In ruling on the admissibility of evidence so obtained, the questions as to the validity of the arrest and the justification for any search made in connection therewith are primarily for the trial court to determine; and on appeal we respect that prerogative and do not upset his determination unless it clearly appears that he was in error.

499 P.2d at 278 (footnote omitted); cited in State v. Elliott, Utah, 626 P.2d 423, 427 (1981).[4]

Officer Alexander sighted and later engaged appellant in the immediate vicinity of the "marijuana compound" in Red Butte Canyon--an extremely rugged area posted no trespassing, containing no trails designated for public use, having but one access road with three locked gates (the first of which displayed no-trespassing signs), and where people were not commonly seen. Before arresting appellant, Officer Alexander had been advised by Gene Lowin, a U.S.F.S. employee who had knowledge of and responsibilities concerning the canyon, that appellant was trespassing (as noted in the statement of facts, he may also have asked appellant for identification and an explanation of appellant's presence in the area). Given the totality of the facts known to Alexander

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[4]At the time of the Eastmond decision, the provisions of § 77-7-2 were contained in § 77-13-3.

and the inferences he might fairly have drawn therefrom (i.e., that appellant most probably had seen the no-trespassing signs conspicuously posted at the entrance to the area's only access road or had encountered the locked gates along that road, and therefore knew that his entry and presence was unlawful; that appellant was not a deer hunter who had permission to be in the area (in that it was not yet hunting season); and that appellant did not otherwise have permission to be in the area based on the information received from the U.S.F.S. employee who was present at the scene of appellant's apprehension), under the standards set forth in State v. Whittenback, supra, and State v. Eastmond, supra, he had probable cause to arrest appellant for criminal trespass as it is defined in Utah Code Ann., § 76-6-206(2)(b), which provides that a person is guilty of criminal trespass under circumstances not amounting to burglary when:

> Knowing his entry or presence is unlawful, he enters or remains on property as to which notice against entering is given by:
> . . .
> (ii) Fencing or other enclosure obviously designed to exclude intruders; or
> (iii) Posting of signs reasonably likely to come to the attention of intruders.

Hence, appellant's arrest was legal and the evidence obtained pursuant to a search incident to that arrest was properly admitted at trial.

POINT II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON THE ELEMENTS OF CRIMINAL TRESPASS.

Appellant argues that although he failed to comply with Rule 51, Utah Rules of Civil Procedure, by not objecting at trial to the jury instruction he now challenges on appeal, this Court, nevertheless, should consider his assignment of error under Utah Code Ann., § 77-35-19(c) (1980). In State v. Kazda, Utah, 545 P.2d 190 (1976), this Court explained the purpose and meaning of Rule 51's requirement that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto":

> There is an important purpose to be served by the rule requiring that objections be made to the instructions. It gives an opportunity for the court to correct, or to fill in any inadequacy in the instructions, so that the jury may consider the case on a proper basis. In order to accomplish that purpose, the rule should be adhered to. Accordingly, the standard rule is that when a party fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, he is thereafter precluded from contending error.

Id. at 192, 193 (footnote omitted) (emphasis added). See also: State v. Valdez, Utah, 604 P.2d 472 (1979); State v. Pierren, Utah, 583 P.2d 69 (1978); State v. Erickson, Utah,

568 P.2d 750 (1977). Because appellant, by his own admission, failed to object to the jury instruction in the trial court, he should be precluded from doing so here.

However, even if this Court is inclined to consider appellant's assignment of error in order to avoid manifest injustice under § 77-35-19(c) (1980), there was simply no error concerning the instructions given; and thus, as was the case in State v. Malmrose, Utah, 649 P.2d 56 (1982) (cited by appellant), appellant makes no showing of injustice. See also: Kazda, supra; State v. Schoenfeld, Utah, 545 P.2d 193 (1976).

Appellant contends that it would be manifestly unjust to sustain his conviction based on what he alleges was a "poorly drafted information whose language was erroneously duplicated in the trial court's instructions to the jury" (Appellant's Brief, p. 9). He claims Instruction No. 12 erroneously combined the elements of burglary and criminal trespass, failing to include the full requirements of either. That instruction read in part:

> Before you can convict the defendant of the crime of Criminal Trespass, Count II, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:
>
> 1. That on or about the 21st day of August, 1980, in Salt Lake County, State of Utah, the defendant, Charles Kermit Lesley, unlawfully entered the property of the U.S. Government.

> 2. That at the time of said entry the defendant, Charles Kermit Lesley, intended to commit the crime of Production Of A Controlled Substance.

R. 60).

According to appellant, Utah Code Ann., § 76-6-206(2)(a)(ii) (1953), as amended, requires that the accused must intend to commit a crime that is not a felony in order to be guilty of criminal trespass; and because felonious intent is an element of burglary but not of criminal trespass, to instruct the jury that it must find that appellant intended to commit the crime of production of a controlled substance (a felony) frustrates the intent of the criminal trespass statute. Appellant even goes so far as to suggest that the state should have charged him with burglary and not criminal trespass. These arguments result from a combination of clever manipulation of the language contained in the criminal trespass statute and a misreading of the burglary statute.

Utah's burglary statute, Utah Code Ann., § 76-6-202 (1953), as amended, reads in part:

> (1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person (emphasis added).

Section 76-6-206(2)(a)(ii), the portion of Utah's criminal trespass statute at issue here, reads:

> A person is guilty of criminal trespass if, under circumstances not amounting to

> burglary as defined in sections 76-6-202, 76-6-203, or 76-6-204
> (a) He enters or remains unlawfully on property and:
> (ii) Intends to commit any crime, other than theft or a felony.

First, because appellant did not enter or remain unlawfully in a building or a portion thereof (under the definition of "building" in Utah Code Ann., § 76-6-201(1) (1953), as amended), he clearly could not have been charged with burglary. Therefore, appellant's suggestion concerning a charge of burglary is entirely without merit.

Second, appellant's interpretation of § 76-6-206(2)(a)(ii) would lead to a rather illogical result: An individual who entered or remained unlawfully on property, other than a building, and who intended to commit "any crime, other than theft or a felony," would be guilty of criminal trespass; yet an individual under the same circumstances who intended to commit a felony would be guilty of no crime. The Legislature could not have intended such a result. The words "other than theft or a felony" simply are mitigating with respect to burglary in that if a person enters or remains unlawfully in a building and intends to commit a crime other than theft or a felony, that person is guilty only of criminal trespass. Those words are not exclusive with respect to criminal trespass, and cannot reasonably be read to render appellant immune from prosecution under § 76-6-206(2)(a)(ii).

In the construction of a statute, the Court must be controlled by the evident purpose of the Legislature to attain a certain end. State v. Navaro, 83 Utah 6, 26 P.2d 955 (1933). In short, the fundamental question which transcends all others is what was the intent of the Legislature. Johnson v. Tax Commission, 17 Utah 2d 37, 411 P.2d 831 (1966). Insuring proper effect to legislative intent and purpose is a primary consideration. Parson Asphalt Production, Inc. v. Utah State Tax Commission, Utah, 617 P.2d 397 (1980); Millett v. Clark Clinic Corp., Utah, 609 P.2d 934 (1980). A statute should not be construed or applied so as to produce incongruous results which were never intended. Snyder v. Clune, 15 Utah 2d 254, 390 P.2d 915 (1964). Accordingly, § 76-6-206(2)(a)(ii) is most reasonably construed as applying to appellant, who unlawfully entered the property of the United States Government with the intent to commit a felony. The trial court's Instruction No. 12 was therefore correctly given.

POINT III

APPELLANT'S MOTION FOR A MISTRIAL WAS PROPERLY DENIED.

Finally, appellant contends that the trial court abused its discretion in not dismissing a juror who apparently was having some difficulty staying awake during the first day

of appellant's trial; and that this denied him the right to a fair trial. Both of the cases cited by appellant in support of his position, United States v. Cameron, 464 F.2d 333 (3rd Cir. 1972); and People v. Dupont, New York, 444 N.Y.S.2d 40 (1981), indicate that the disqualified jurors therein were grossly inattentive (e.g., the juror in Cameron had been asleep at least 50 percent of the time during trial). Appellant has not shown that this was the situation here. He merely quotes a brief exchange between the trial judge and Mr. Kilpack, the juror, which indicates the judge's concern about Kilpack's ability to remain awake (T. 101). Concern for a sleepy juror was not indicated by any of the parties at any other time during the trial. It should also be noted that the trial court decided to recess for the day when it became aware of Mr. Kilpack's difficulty--a reasonable, discretionary response to the problem, which quite obviously protected appellant's right to a fair trial.

In State v. Pace, Utah, 527 P.2d 658 (1974), this Court addressed a similar claim that the trial court erred in not declaring a mistrial because of inattentiveness or drowsiness of jurors. Justice Henriod, writing for a unanimous Court, said:

> Two onlookers said two of the jurors consciously went to sleep. The trial judge, not charged with somnambulism, in denying the motion for mistrial, said that

> he had observed the whole jury; that one had not gone to sleep, and the other did "doze for a second, twice" but had aroused before he, (the judge) "had a chance to call it to her, (the juror's) attention." Hence there seems to have been nothing in the eyes of the beholder, nor in the arms of Morpheus reflecting that the juror could have been ensconced, so as to have stupefied the veniremen, or the sound discretion of the trial judge.

527 P.2d at 659 (footnotes omitted).

The trial judge in appellant's case was in a favored position for observation of the juror, Mr. Kilpack; and the exercise of his discretionary judgment denying appellant's motion for a mistrial should not be disturbed on appeal, just as this Court did not disturb the trial judge's discretion in State v. Pace, supra. See also: People v. Hanes, Colo. App. 596 P.2d 395 (1978), affirmed, 598 P.2d 131 (1979), citing State v. Pace, supra. In short, appellant has made no showing that the trial court's action denied him the right to a fair trial.

CONCLUSION

For the reasons discussed above, respondent respectfully submits that the trial court's judgment and sentence respecting both the charge of production of a controlled substance and the charge of criminal trespass should be affirmed.

Respectfully submitted this 24th day of January, 1983.

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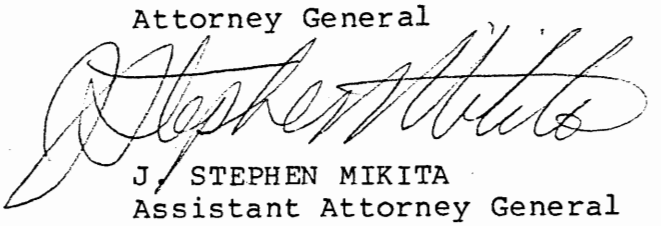

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Ronald J. Yengich, Attorney for Appellant, 44 Exchange Place, Salt Lake City, Utah, 84111, this 24th day of January, 1983.

Susan Patton