1990

The State of Utah v. Donald Wayne Gambrell : Brief of Appellant

Utah Court of Appeals

Scott M. Burns; Iron County Attorney; Attorney for Plaintiff-Respondent.
James L. Shumate; Attorney for Defendant-Appellant.

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 900559-CA
	)	
DONALD WAYNE GAMBRELL,	)	Classification Priority 2
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT

Appeal from a Judgment, Sentence, and Order of Commitment on three counts of Negligent Homicide, a Class A Misdemeanor, following a jury trial in the Fifth Circuit Court for Iron County, Cedar City Department, the Honorable Robert T. Braithwaite presiding.

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JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 78-2A-3(2)(d), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a conviction following a jury trial on the charges of three counts of Negligent Homicide. The Defendant was sentenced to serve three (3) consecutive one year terms in the Iron County Jail, one year on each count of negligent homicide.

ISSUES PRESENTED ON APPEAL

The issues presented by this appeal are whether the Court, under the facts of this case, has the authority to impose consecutive rather than concurrent sentences upon this Defendant, and whether the court was without jurisdiction by failure of the County Attorney to post a bond upon taking office.

DETERMINATIVE STATUTES

The statutes which are believed to be determinative in this matter are 76-1-401 and 76-1-402, Utah Code Annotated, 1953, as amended. These statutes are reproduced in total as the addendum to this brief.

NATURE OF THE CASE

This is an appeal from a Judgment, Sentence and Commitment from the Fifth Circuit Court of Iron County, Cedar City Department, following a jury trial in which the Defendant was convicted of three counts of Negligent Homicide.

COURSE OF THE PROCEEDINGS

The Defendant was tried by a jury and convicted of three counts of Negligent Homicide. The Defendant did not return to Utah for sentencing until October 16, 1990, and he was sentenced to three consecutive terms of one year in the Iron County Jail.

DISPOSITION AT TRIAL COURT

The Defendant was sentenced to serve three consecutive terms of one year in the Iron County Jail with the court maintaining jurisdiction to review the sentence after one year.

STATEMENT OF FACTS

On August 20, 1989, the Defendant, Donald Wayne Gambrell was driving a semi-trailer truck loaded with steel mine-framing materials on Highway U-14 east of Cedar City, Utah. (T.213) Mr. Gambrell's direction of travel was east to west. Traveling west to east up U-14, which is a mountainous,

paved, two-lane highway, were Robert C. Griffin, Neoma G. Baldwin, and Colette M. Griffin. (T.47) Near milepost 13 of the highway, on a downgrade, Mr. Gambrell lost the braking system in the truck and it began to accelerate out of control. (T.220-222) In an attempt to drive the truck across the on-coming lane of travel and into a hillside, Mr. Gambrell struck the vehicle occupied by Robert C. Griffin, Neoma G. Baldwin, and Colette M. Griffin killing all three. (T.225) Mr. Gambrell was convicted in a jury trial on December 14, 1989, of three counts of negligent homicide. He was sentenced to one year in the Iron County Jail on each count, the sentences to run consecutively, one to follow the other.

SUMMARY OF ARGUMENT

The trial count does not have authority under the Criminal Negligence statute to impose three consecutive sentences upon this Defendant in this case.

The trial court was without jurisdiction to try this Defendant because of the failure of the Iron County Attorney to post a bond upon taking office.

ARGUMENT

POINT I

THE DEFENDANT'S CONDUCT IN THIS CASE CAN BE PUNISHABLE ONLY BY ONE SENTENCE IN THE IRON COUNTY JAIL, NOT THREE CONSECUTIVE SENTENCES.

The court's attention is drawn specifically to 76-1-402, Utah Code Annotated, 1953, as amended, wherein a

Defendant may be prosecuted in a single action for all separate offenses arising out of a single criminal episode. However, when the same act of a Defendant establishes offenses which may be punished in different ways, the act can only be punished in one of the multiple ways. In the present instance before the court, Mr. Gambrell's "act" was not an act at all but rather an omission found by the jury to rise to the degree of criminal negligence. The jury apparently believed that Mr. Gambrell was criminally negligent in driving his heavily laden semi-trailer truck down Highway U-14 with brakes that were not properly adjusted. The case law presently pertinent to the point raised on appeal is most closely found in the case of State v. Mane, 783 P.2d 61 (Utah Ct.App., 1989). However, this case varies substantially in its factual setting. In the Mane case, the Defendant was involved in an intentional act of firing a firearm, which act harmed two (2) different victims. In upholding consecutive rather than concurrent sentences, this court reasoned in the Mane case that the Defendant's "act" was voluntary and that because of the definition under Utah State Law of a voluntary act, the Defendant could be punished with consecutive sentences for both the homicide and aggravated assault. This court has cited with approval the case of State v. James, 631 P.2d 854 (Utah, 1981), wherein the Utah Supreme Court stated,

> "A defendant who commits an act of violence with the intent to harm more than one person or by means likely to cause harm to more than several persons is more culpable than a defendant that harms only one person."

In the present case, this Defendant, Mr. Gambrell, did not perform any act but simply involved himself in a fact setting which the jury determined to be criminally negligent. Under these circumstances, it would appear that the Defendant's criminal negligence can only be punished in one of the multiple ways and that he may be incarcerated for only one year.

POINT II

THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THIS DEFENDANT BECAUSE OF THE FAILURE OF THE IRON COUNTY ATTORNEY TO POST A BOND UPON TAKING OFFICE.

17-16-11, Utah Code Annotated, 1953, as amended, requires that the Iron County Attorney execute a bond for faithful performance of his office. The actual bond purportedly filed by the Iron County Attorney is entitled "Public Employee's Blanket Bond" and is attached to the Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss filed with the Circuit Court on February 14, 1990. However, neither the bond from Western Surety Company known as a public employee's blanket bond nor the representations of the bonding company address the fact that Scott M. Burns, the Iron County Attorney, had not executed a bond for the faithful performance of his office within the time required by statute.

The undersigned, at the time I served as Iron County Attorney from 1979 through 1982, was required to first obtain a bond from Western Surety Company and sign the same and deliver and file it with the Iron County Clerk prior to taking the oath

of office as the Iron County Attorney on January 1, 1979.

Under the provisions of 52-2-1, Utah Code Annotated, 1953, as amended, the office of Iron County Attorney is vacant is vacant and was vacant sixty (60) days after the beginning of the term of Mr. Burns on January 1, 1987. The case which appears to be controlling is now ninety-years old, but the case of State v. Beddo, 63 P.96 (Utah, 1900), provides that the trial court has only jurisdiction to dismiss the matter when the prosecutor is not appropriately qualified.

This Defendant takes the position that because of the failure of Mr. Burns to qualify for office under the provisions of 52-2-1, Utah Code Annotated, 1953, as amended, which statute was upheld and supported in the case of State Ex Rel. Stain v. Christensen, 35 P.2d 775, the Iron County Attorney's office has no jurisdiction in this matter and the case must be dismissed.

CONCLUSION

This Defendant specifically requests this court to reverse and remand this matter to the Circuit Court with instructions to dismiss the case for lack of jurisdiction or in the alternative to rule that the Defendant's sentence be limited to one year on the three consecutive sentences for each count under the single criminal episode act.

DATED this 8 day of January, 1991.

JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Scott M. Burns, Iron County Attorney, P.O. Box 428, Cedar City, Utah 84720, this 8 day of January, 1991, first class postage fully prepaid.

JAMES L. SHUMATE

MULTIPLE PROSECUTIONS AND DOUBLE JEOPARDY

76-1-401. "Single criminal episode" defined — Joinder of offenses and defendants.

In this part unless the context requires a different definition, "single criminal episode" means all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective.

Nothing in this part shall be construed to limit or modify the effect of Section 77-21-31 in controlling the joinder of offenses and defendants in criminal proceedings. 1975

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(1) A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of that included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant 1974