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Elwood E. McFarland v. Skaggs Companies, Inc. : Brief of Defendant-Appellant

Utah Supreme Court

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IN THE SUPREME COURT

STATE OF UTAH

ELWOOD K. McFARLAND, Plaintiff/Respondent, vs. SKAGGS, INC., Defendant/Appellant.	Case No. 18352

BRIEF OF DEFENDANT/APPELLANT

APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY, HONORABLE RONALD O. HYDE, DISTRICT JUDGE

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IN THE SUPREME COURT

STATE OF UTAH

ELWOOD K. McFARLAND,	)	
Plaintiff/Respondent,	)	Case No. 18352
vs.	)	
SKAGGS, INC.,	)	
Defendant/Appellant.	)	
	)	

BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an appeal from a jury verdict and judgment in favor of Respondent in a case of false arrest.

DISPOSITION IN THE LOWER COURT

A jury in the Second Judicial District Court for Weber County, the Honorable RONALD O. HYDE, judge presiding, returned a verdict in favor of Respondent for false arrest in the amount of $10,000.00 general damages and $25,000.00 punitive damages.

RELIEF SOUGHT ON APPEAL

Respondent requests this Court to uphold the jury verdict and judgment below and dismiss this appeal.

STATEMENT OF FACTS

With the exception of the first paragraph, the Statement of Facts presented by Appellant is totally irrelevant. The cardinal rule of appellate procedure is that the party prevailing below is entitled to have facts and evidence reviewed by this Court in the light most favorable to the jury's verdict. Hutchison v. Gleave, 632 P.2d 815 (Utah 1981); Cintron v. Milkovich, 611 P.2d 730 (Utah 1980); Gossner v. Dairyman Associates, Inc., 611 P.2d 713 (Utah 1980); Ute-Cal Land Development Corporation v. Sather, 605 P.2d 1240 (Utah 1980). The facts, as testified to at the trial by Respondent, are as follows:

On January 9, 1980, at about 5:30 P.M., ELWOOD K. McFARLAND, Respondent, entered a Skaggs Drug Store in Ogden, Utah, for the purpose of purchasing a T.V. antenna plug, as he had been requested to do by his wife. (Record p.6.) Respondent was familiar with the Skaggs store and had shopped there frequently, as it was very close to his dentistry office. After checking the two store racks where he expected the part to be, Respondent, after not finding the part, left the store. A few steps outside the exit, Respondent was accosted by ANITA AVONDET. Avondet was not wearing any identifying badges or clothing which would in any way denote that she was a security officer for the Skaggs store. (R. 15, 18, and 130-131.) Further, Avondet

did not identify herself as a security officer. (R. 15.) She merely stated to Respondent, "Sir, I want to talk to you." (R. 16.)

Respondent, unaware of Ms. Avondet's status as a security guard or any reason for her concern, attempted to step past Avondet and extended his arm to brush her away - thinking she was trying to sell him something. (R. 16.) At that time a scuffle ensued with Avondet forcibly grabbing Respondent by both lapels. (R. 14.)

At some point during the scuffle, while Respondent was attempting to release Ms. Avondet's unwarranted grasp of his lapels, Respondent suddenly realized that Avondet was not just some kook trying to sell him books or flowers since these kooks don't usually fight you for your money. (R. 44.) Respondent indicated to Avondet that he understood what she wanted, but she was making a big mistake. (R. 20.)

Avondet responded that she wasn't paid "to make mistakes." (R. 20.) Accordingly, Respondent ceased scuffling and accompanied Avondet back through the store, under the humiliating gazes of store employees and customers, and up to the security office.

After Respondent was seated in the office, Avondet called the police and reported a "shoplifting case." (R. 20.) Avondet then asked Respondent to "take whatever you've taken from that pocket right there" while pointing to Respondent's

right-hand raincoat pocket. (R. 20.) Respondent thereupon produced his car kets from the pocket. (R. 23.) Avondet made no further search of Respondent, though Respondent specifically asked her if she wanted to. (R. 24.) Other store personnel searched along Respondent's route out of the store and in the area of the scuffle but failed to find any stolen merchandise. (This is obviously because Respondent had not stolen anything.) Sometime later two Ogden City police officers arrived. During a conversation between Avondet and one of the police officers in a hallway, Respondent overheard, for the first time, the police officer mention assault, after only hearing Avondet's side of the story. (R. 28-29.)

After the discussion in the hall between Avondet and the officer, Respondent was told by the officer he was free to go. (R. 31.) Respondent was never formally charged with any crime as a result of this incident, nor was Respondent ever brought before a magistrate. After being released, Respondent was again forced to make the embarrassing walk out of the Skaggs store, under the gaze of employees and customers.

Respondent instituted this lawsuit against Skaggs, seeking $10,000.00 in general damages and $50,000.00 in punitive damages. At trial, while discussing the various requested instructions, it became apparent for the first

time that Appellant was going to attempt to justify the arrest, claiming it was predicated on an assault. The trial court warned Appellant's counsel that the law, as the judge understood it, provided no probable cause privilege for such an arrest by a private citizen. (R. 197.) Appellant, nonetheless, proceeded to adduce "assault" testimony and argue this purported defense to the jury. Respondent requested and received leave to submit supplemental jury instructions concerning assault, which became the court's Instructions 11 and 12.

Based on the testimony, instruction, and argument, the jury returned a verdict in favor of Respondent in the amount of $10,000.00 general damages and $25,000.00 punitive damages. The trial court denied Appellant's Motion for a New Trial, and this appeal resulted.

ISSUES PRESENTED

1. Whether the trial court's instruction that there was no probable cause privilege for a private arrest for assault accurately reflects the law of Utah.

2. Whether the trial court was correct in denying Respondent's motion that any assault arrest privilege had been lost by failure to bring Respondent before a magistrate.

3. Whether the trial court's instruction requiring Appellant to prove, beyond a reasonable doubt, that an

assault had been "committed" accurately reflects the law of Utah.

4. Whether the rule of stare decisis is to be totally ignored and this Court reverse Terry v. ZCMI, 605 P.2d 314 (Utah 1979).

A R G U M E N T

POINT I

THE TRIAL COURT'S INSTRUCTIONS ACCURATELY REFLECTED UTAH LAW.

A.

THE COURT'S INSTRUCTIONS CONCERNING MERCHANTS' PRIVILEGES IN SHOPLIFTING CASES PROPERLY STATED UTAH LAW.

Given the organization of Appellant's Brief, it is difficult to determine whether or not Appellant is still maintaining that the trial court's instructions concerning merchants' privileges in shoplifting cases were proper. It makes little difference whether Appellant is so arguing or not. Even a cursory reading of the instructions shows their adequacy.

First, it is incorrect to state that Section 78-11-17, Utah Code Annotated, does not require a "reason to believe." (Brief of Appellant, p.8.) In fact, the statute contains those precise words. Thus, the trial court's Instruction No. 7, which clearly lays out the

requirements of reasonable belief, adequately summarizes the merchant's privilege. The other instructions requested by Skaggs would therefore have been merely improperly cumulative. See e.g. 75 Am. Jur. 2d 597, Trials, Sec. 630. Further, Appellant has not even attempted to make a cursory showing that any imagined impropriety in the instructions had any effect whatsoever on the jury in their deliberations.

B.

THERE IS NO PRIVATE PROBABLE CAUSE PRIVILEGE IN UTAH TO ARREST FOR ASSAULT.

The circumstances under which a private person is privileged to arrest another in the State of Utah are stated very clearly in one single sentence. Section 77-7-3 states:

> A private person may arrest another for a public offense committed or attempted in his presence. (Formerly Section 77-13-4)

No matter how many times one reads the above statute, the words "probable cause" fail to appear. Despite this obviously intentional legislative omission - and certainly no one contends that the Legislature could not have created such a privilege if it wanted (see e.g. 77-7-2, formerly 77-13-3) - Appellant maintains that a "fair reading" requires this Court to insert "probable cause" into the statute.

This would not only be unfair; it would also be judicial activism of its worst kind. The statute plainly

requires the offense to have been "committed;" and in the ordinary English language, "committed" requires that the act or offense to have actually occurred.

Simply put, a private person - even a store security officer - is not a policeman and not entitled to the same privileges and protections. If Ms. Avondet wants to arrest someone for the crime of assault, she had better be right. She wasn't. As the American Law Institute states in the Restatement of the Law, Torts, Second, Section 119, Comment O:

> If, in fact, no breach of the peace [the crime of assault in this case] has been committed, a mistaken belief on the part of the actor that a breach of the peace [assault] has been committed by the other does not confer a privilege to arrest under clause (c). Thus, for a private person to claim a privilege to arrest, it must be shown that the crime was actually committed.
> (Emphasis added.)

Other authorities are unanimous in support of this rule. In 32 Am. Jur. 2d 166, False Imprisonment, Section 97, it is stated:

> It follows that liability for false arrest or imprisonment may arise when a private individual or a peace officer makes an arrest for a misdemeanor and the offense complained of was actually not committed, even though such arrest is made on reasonable grounds and in good faith.
> (Footnotes omitted, Emphasis added.)

Note that this section even imposes liability on police officers for a mistake concerning arrests for misdemeanors

committed in their presence. The privilege sought by Appellant would afford security officers greater protection than police officers; a clearly nonsensical result. See also Prosser, Torts, Sec. 26 (4th ed. 1971).

With all due respect to the various bits of obiter dicta cited by Appellant, the law in Utah, which was properly reflected by the court's instruction, is that there is no private privilege to arrest in a case such as this one, based on probable cause.

Another fact illustrating this point is that such a probable cause privilege would have made the various shop-lifting statutes totally unnecessary. The whole purpose of these statutes is to protect the merchants by granting them a privilege that they did not have under common nor statutory law.

C.

THERE WAS NO "IMMINENT ASSAULT" PRIVILEGE IN THE INSTANT CASE.

Appellant's second attempt to excuse the assault arrest is based on a theory of self-defense. The privilege it claims, as stated in the Restatement of Torts, Second, Sec. 67, is as follows:

> The actor is privileged intentionally to confine another ... for the purpose of preventing him from inflicting a harmful or offensive contact or other bodily harm upon the actor ....
> (Emphasis added.)

The difficulty with attempting to apply the "prevention of imminent assault" privilege to the instant case is that the facts simply don't support the purpose of the privilege. It is crystal clear that Avondet initially intended to arrest Respondent for shoplifting. (R. 95.) As defined by the Utah Code, Section 77-7-1 (formerly 77-13-2), that arrest was completed when Ms. Avondet restrained Respondent by grabbing his lapels. Indeed, even if Avondet's testimony is to be believed, the first time she indicated it was an assault arrest was upstairs in the manager's office. Thus, the purpose and policy, i.e., self-defense, is not served in the least by this contrived assault "arrest."

It is laughable to contend that a person seriously bent on committing an assault would be in any way deterred by the pronunciamento: "You're under arrest." Indeed, all of the cases and authorities cited by Appellant rely heavily on the policy of prevention to justify the arrest. See Collyer v. S. H. Kress & Company, 54 P.2d 20, 23 (Cal. 1936) - "about to injure defendant;" Fanier v. Chesapeake and Patomac Telephone Co. of Maryland, 404 A.2d 147, 153 (D.C. 1979) - "protection of his person;" Restatement of Torts, Section 141, Afray - "participating or about to participate in the afray."

Privileges are, and should be, applicable only when the policy behind them is served by their application.

In the instant case the policy behind the privilege of private arrest for "imminent assault," i.e., self-defense, would in no way be served. Avondet's secret intention to arrest for assault - and it was so secret that she didn't reveal it until everyone was calmly seated in the office - was in no way related to her self-defense. It was instead, as the jury obviously found, merely a trumped-up allegation created solely in the attempt to insulate a bad shoplifting arrest.

Moreover, as shown by the testimony of Respondent, which should be accepted by this Court on review, the contrived assault arrest was created ex post facto. That is, Respondent was never informed of this purported justification during his confinement. It was obviously created sometime subsequent in a futile attempt to confuse the jury. Fortunately, it did not succeed.

POINT II

THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT, AS REQUESTED BY RESPONDENT ON THE ASSAULT ARREST.

In chambers, after conclusion of the testimony, Respondent moved the trial court for a directed verdict of false imprisonment on the assault arrest, on the grounds that Appellant failed to charge Respondent within a reasonable period of time. (R. 192.) The court denied the motion

on the grounds that this was merely a "transitory" arrest. (R. 193.) The court also refused to give Respondent's requested supplemental instruction No. ___ (R. 367), stating the requirement that Respondent must have been brought before a magistrate or else any arrest privilege was lost.

The general law across the United States is that a private person making an arrest must bring the arrested person before a magistrate within a reasonable period of time after the arrest. There is no dispute in the instant case that such delivery did not occur. In fact, though it was never charged, it is clear that Avondet committed a Class B Misdemeanor by such failure. As stated in Section 77-13-17 (renumbered in the 1981 revision as Section 77-7-23):

> When an arrest is made without a warrant by a peace officer or private person, the person arrested shall, without unnecessary delay, be taken to the magistrate in the precinct of the county or municipality in which the offenses occurred, and an information, stating the charge against the person, shall be made before the magistrate. *** Any officer or person violating any of the provisions of this section shall be guilty of a Class B Misdemeanor.
> (Emphasis added.)

The policy behind this statute is not difficult to determine. Simply put, an arrested person must be brought before a magistrate quickly in order to insure that

normal procedures of the criminal law are complied with. That manifestly did not occur in this case.

Accordingly, the court erred in not directing a verdict on the contrived assault charge, as any privilege of arrest was clearly abused and lost by the failure to bring Respondent before a magistrate. See Harper & James, Torts, Sec. 3.17 at 274 (1956) and Prosser, Torts, Section 25 at 130-131 (4th ed. 1971). The court further erred in refusing to give Respondent's requested supplemental instruction ____ (R. 367.). The instruction is clearly mandated by the law and was drawn, verbatim, from Instruction No. 21:19, Colorado Jury Instructions, Civil. Even without a directed verdict on the assault issue, the jury, with this instruction, would have had to return a verdict for Respondent regarding the assault. Either a directed verdict or Respondent's requested instruction would have mooted all of Appellant's arguments on the assault issue.

POINT III

THE REASONABLE DOUBT STANDARD FOR THE ASSAULT WAS CORRECT.

It should be noted that this Court not reach the "reasonable doubt" issue for two reasons. First, Respondent's testimony shows that the alleged assault arrest was merely a fiction created for the trial by Ms. Avondet. Respondent, according to his testimony, was never informed of any such

arrest. Second, as shown in Point II, supra, the trial court should have directed the verdict on the assault charge for failure to bring Respondent before a magistrate as required by Utah law.

Even should this Court reach the propriety of the "reasonable doubt" instruction, the trial court was clearly correct. As shown above, Point II-B, supra, there is no private privilege to arrest unless the "crime" was actually "committed." It seems impossible to determine whether a "crime" was "committed" without using criminal standards, which is precisely what the trial court required.[1/]

Despite the ineluctable logic of the above sylogism, Appellant seeks to muddy the waters by citing - out of context - several ancient and inapposite authorities. In each of these authorities, the question at issue was whether a tort or some other action, which has some elements parallel to a crime, must be proven beyond a reasonable doubt. The obvious, and correct, answer is that it need not be.

Such is not the case here. In this case Appellant seeks to invoke a statutory privilege to arrest for the commission of an actual crime - not a parallel tort. This is totally different from Avondet asserting that she

1/ This is obviously the precise reason that Section 77-13-17 required the bringing before a magistrate - viz to set the criminal procedure in motion for an ultimate judicial determination of criminality.

"arrested" Respondent in self-defense to protect herself from an attempted assault. (As shown above, Point II-C, supra, such a self-defense privilege to prevent "imminent assault" is also inapplicable here.)

If Avondet had defended on the grounds of self-defense, the only standard of proof required would have been a preponderance. Instead, Appellant attempted to invoke a statutory protection, and must therefore comply with its requirements. As stated in Prosser, Torts, Sec. 26 (4th Ed. 1971):

> The private person may arrest if a felony has in fact been committed, and he has reasonable grounds to suspect the man whom he arrests, but his authority depends on the fact of the crime, and he must take the full risk that none has been committed.
>
> * * *
>
> It has even been held that the felony which has occurred must be the very one for which he purports to make the arrest. (Citations omitted, Emphasis added.)

Obviously, the protections afforded a private person for a mere misdemeanor or breach of the peace are less than these for a felony.

In summary, a private arrest for a crime is only privileged if the crime actually was committed. The only way to determine commission is by the criminal standard, and since Avondet herself frustrated that determination - and committed a Class B Misdemeanor while doing so - she should

not be allowed to profit from such action. The only way for this jury to decide whether a crime had, in fact, been committed was to test the case by the criminal standards.[2/]

POINT IV

THE TRIAL COURT, FOLLOWING THE RULE OF STARE DECISIS, PROPERLY APPLIED THE TERRY STANDARD OF IMPLIED MALICE.

Respondent feels constrained to point out that Appellant's Point III is not so much an attack on the decision in Terry v. ZCMI, 605 P.2d 314 (Utah 1979), as an attack on the very foundation of the Anglo-American judicial system - the rule of stare decisis. Appellant's blatant attempt to undermine this rule goes so far as to point out the change in membership in this court since Terry.

This desperate attempt to throw the baby out with the bath water forgets what this Court surely will not. This Court is not the sum of its members nor its members individually. It is a continuing, co-equal branch of government charged with interpreting the laws of the State of Utah. The lower courts in Utah, as required by our system of justice, look to it for guidance and follow its decisions. This is how it should be.

Since this Court decided Terry, the Utah Legislature has met twice in Budget Session, once in General

2/ It goes almost without saying that the police officer's testimony concerning the "assault" is without any weight. His opinion was formed after talking to only one party to the event and hearing her self-serving story.

Session, and several times in Special Session. Despite these ample opportunities, the Legislature has never modified this Court's ruling in Terry concerning malice, though it certainly had the power to do so. This continuing acquiescence affixes the legislative imprimatur on this Court's decision and also mandates the required procedure for its change - i.e., legislation. Black Bull, Inc., v. Industrial Commission, 547 P.2d 1334 (Utah 1976).

Aside from the foregoing, Terry was correctly decided, notwithstanding Professor Boyce's "Thumbnail Sketch" and a student "Development," for all the reasons cited in the Court's opinion. These reasons need not be reiterated here, as they are more eloquently stated in this Court's own opinion.

There is no dispute that the trial court properly applied the Terry rule in making its instruction concerning punitive damages. The instruction, No. 14 (R. 377), was basically JIFU 90.76 with changes showing implied malice in law and enumerating those factors which the jury could consider in determining the amount of punitive damages.

Even should this Court decide to overrule Terry, it should do so prospectively, leaving the verdict here intact. There is ample precedent for such an action, and the United States Supreme Court has recently furnished guidelines for determining to grant prospective application. In

Northern Pipeline Construction Co. v. Marathon Pipeline Company, ____ U.S. ____, 50 Law Week 4892, 4902 (Nos. 150 & 546, June 28, 1982), holding the Bankruptcy Act of 1978 in conflict with Article III of the Constitution, the Court stated:

> Our decision in Chevron Oil Co. v. Huson, 404 U. S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases, id., at 106; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question, id., at 107; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases, ibid.

In the instant case, as in Northern Pipeline, all three tests militate against retroactive application. Clearly, there have been no augeries foreshadowing this Court overruling its own recent Terry decision. Neither would retroactivity aid in the application of such a new holding. Finally, retroactivity would be extremely inequitable requiring a re-trial with all its attendant pain, delay, and cost.

The trial court, counsel, and the jury followed the directives of this Court as well as humanly possible. It would be unfair and unjust to change the rules of the

game after it is over. Stare decisis should hold, Terry should be followed, and this appeal dismissed.

C O N C L U S I O N

Appellant tried to cover up a bad shoplifting arrest with a contrived assault arrest. The jury did not fall for it, and now, on appeal, Appellant asserts several alleged "errors" on behalf of the trial court in an attempt to have this Court do for it what the jury refused to do.

The trial court did not err in instructing the jury that there is no private probable cause arrest privilege for assault. The unambiguous language of the statute simply doesn't create such a privilege.

Further, the facts don't support an arrest for the prevention of "imminent assault." The bad shoplifting arrest was already completed, and the policy of self-defense was in no way served by Avondet's secret intentions.

The trial court did err in not directing a verdict for Respondent on the grounds that, even assuming arguendo an assault arrest privilege existed, Appellant's criminal failure to bring Respondent before a magistrate waived any privilege. This ruling would have mooted the first two issues and resolved the confusion created by Appellant's cover-up.

Finally, Respondent, the trial court, and the jury are entitled, under stare decisis, to rely on the continuing vitality of this Court's holdings. The rule of Terry was properly applied, and the verdict should be upheld.

This appeal should be dismissed and Respondent given final relief and vindication from the ordeal he suffered at the hands of Appellant.

DATED this ____ day of September, 1982.

FINDLEY P. GRIDLEY

BRUCE R. BAIRD

(Attorneys for Respondent)

CERTIFICATE OF DELIVERY

I hereby certify I personally delivered two true and correct copies of the foregoing Brief to STEPHEN G. MORGAN, attorney for Appellant, 261 East 300 South, Second Floor, Salt Lake City, Utah, on this ____ day of September, 1982.

BRUCE R. BAIRD, ESQ.