1984

Elwood E. McFarland v. Skaggs Companies, Inc. : Petition for Rehearing

Utah Supreme Court

Findley P. Gridley; Bruce B. Baird; Attorneys for Plaintiff-Respondent;
Stephen G. Morgan; Attorney for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

- -

ELWOOD E. McFARLAND,

Plaintiff/Respondent,

vs. Case No. 18352

SKAGGS COMPANIES, INC.,

Defendant/App[ellant.

- -

PETITION FOR REHEARING

- -

From a Judgment of the Second District Court

In and For Weber County

The Honorable Ronald O. Hyde, Presiding

- -

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REASON A REHEARING SHOULD BE GRANTED

THIS COURT COMMITTED ERROR IN HOLDING AS A MATTER OF LAW THAT AVONDET (SKAGGS) DID NOT MAKE A PROPER ARREST OF McFARLAND SINCE SHE DID NOT COMPLY WITH THE PROVISIONS OF SECTION 77-7-6 WHICH REQUIRES THE PERSON MAKING THE ARREST TO DISCLOSE HER "INTENTION, CAUSE AND AUTHORITY TO ARREST" BECAUSE

(1) THIS COURT OVERLOOKED THE EXCEPTION TO SECTION 77-7-6 (AS EVIDENCED BY THE SILENCE IN THE COURT'S OPINION CONCERNING IT) WHICH IS SET FORTH IN SECTION 77-7-6(2) WHICH PROVIDES THAT A PERSON NEED NOT COMPLY WITH THE REQUIREMENTS OF "INTENTION, CAUSE AND AUTHORITY TO ARREST" WHEN THE PERSON BEING ARRESTED (DETAINED) IS "ACTUALLY ENGAGED IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT THE OFFENSE (ASSAULT); AND

(2) THIS COURT SHOULD RENDER A DECISION, ON REHEARING,

(A) WITH RESPECT TO THE EXCEPTION, i.e., WHETHER OR NOT McFARLAND WAS "ACTUALLY ENGAGED IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT THE OFFENSE (ASSAULT) "AT THE TIME AVONDET ARRESTED (DETAINED) HIM, AND

(B) WITH RESPECT TO WHETHER THIS ISSUE CAN BE DECIDED AS A MATTER OF LAW OR WHETHER IT SHOULD BE DECIDED BY A JURY ON REMAND.

CASES CITED

State v. Beard, 294 P.2d 29 (Cal. 1956) . . . . . 4 & 7

STATUTES CITED

Section 77-7-6 U.C.A., 1953 . . . . . 1, 2, 3, 4, 5, 6 & 7

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PETITION FOR REHEARING

- -

Defendant/Appellant Skaggs petitions the Court for a rehearing pursuant to Rule 76(e) of the Utah Rules of Civil Procedure for the following reason:

REASON A REHEARING SHOULD BE GRANTED

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(A) WITH RESPECT TO THE EXCEPTION, i.e., WHETHER OR NOT McFARLAND WAS "ACTUALLY ENGAGED IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT THE OFFENSE (ASSAULT) "AT THE TIME AVONDET ARRESTED (DETAINED) HIM, AND

(B) WITH RESPECT TO WHETHER THIS ISSUE CAN BE DECIDED AS A MATTER OF LAW OR WHETHER IT SHOULD BE DECIDED BY A JURY ON REMAND.

1. This Court held as a matter of law that Anita Avondet, Skaggs' security officer, did not make a proper arrest for assault pursuant to §77-7-6 Utah Code Annotated, 1953, because she did not inform plaintiff/respondent McFarland of her "intention, cause and authority to arrest (notwithstanding the fact that the trial court held as a matter of law that because the arrest was transitory (in the process of being committed), whether or not it was a proper arrest was a jury question. But, where this court erred was it did not consider the exception to §77-7-6 which is set forth in §77-7-6(2), which provides that the requirements of "intention, cause and authority" to arrest "need not be complied with if the person being arrested is "actually engaging in the commission of or an attempt to commit the offense (assault) "at the

time of the arrest or detention. This exception must be considered and decided upon in this case.

2. Both Appellant and Respondent relied on the trial court decision that this issue was a jury question and pursuant thereto neither Appellant nor Respondent raised this issue on appeal nor did Appellant or Respondent brief or argue this issue on appeal and therefore, Appellant should be given an opportunity, in all fairness, to brief and argue this issue on rehearing, especially in light of the fact that the Utah Supreme Court did not render any decision concerning the exception to §77-7-6.

3. If this court would allow Appellant to brief and argue this issue on rehearing, it would realize that it committed error and an injustice in ruling as a matter of law that the arrest by Avondet of McFarland for assault, under §77-7-6 was not proper without rendering any decision concerning the exception ennumerated in §77-7-6(2) which waives the requirements of "intention, cause and authority to arrest" if the person arrested or detained, McFarland, was "actually engaged in the commission of or an attempt to commit "an assault at the time of his arrest or detention.

(A) §77-7-6 provides as follows:

> Manner of making arrest. The person making the arrest shall inform the person being arrested of his intention, cause and authority to arrest him. Such notice shall not be required when:
> (1) There is reason to believe the notice will endanger the life or safety of the officer or another person or will likely enable the party being arrested to escape;
> (2) The person being arrested is actually engaged in the commission of, or an attempt to commit, an offense; or

> (3) The person being arrested is pursued immediately after the commission of an offense or an escape.

(B) §77-7-6(2) waives its own requirement and does not require "intention, cause and authority to arrest" if "the person being arrested is actually engaged in the commission of or an attempt to commit an offense."

(C) There was evidence in the record McFarland struck Avondet twice, knocking her down, and that after regaining her feet, Avondet produced handcuffs and then McFarland declared "Ok. Ok. I'll go back in." (Record p. 95).

(D) Under similar facts and an almost identical statute, the California Supreme Court held there was no requirement to inform of "intention, cause and authority to arrest" in State v. Beard, 294 P.2d 29 (Cal. 1956) as follows:

> Defendant also contends, however, that the officers failed to comply with Section 841 of the Penal Code and the arrest was therefore unlawful. That section provides: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." The record is not clear as to just what the officers said to defendant at the time of the arrest and search, and it may be conceded that there is some evidence that they did not expressly inform him "of the intention to arrest him, of the cause of the arrest, and the authority to make it." Since the trial court found, however, that defendant was arrested while engaged in the commission of the offense, there was no violation of Section 841.

Id., at 30 (Emphasis added).

Thus, the California Supreme Court held that its requirement of "intention, cause and authority" was not applicable to the facts of the Beard case because the person being arrested (detained) was, at the time one would normally be informed, "engaged in the commission of the offense."

In the case at bar, the Utah Supreme Court, has ruled as a matter of law that the arrest for assault was improper because Avondet did not inform McFarland, at the time he was assaulting her, of her "intention, cause and authority" but what the Utah Supreme Court overlooked, which is clear from the opinion since there is no mention of it, is the exception to §77-7-6 that one need not comply with the formal requirements and advise as to "intention, cause and authority" if the person being arrested (detained) is "actually engaged in the commission of or an attempt to commit the offense" (assault) §77-7-6(2). If the Utah Supreme Court will consider this exception on rehearing, based on the facts of this case as set forth in the record, the Utah Supreme Court will conclude that whether or not McFarland was "engaged in the commission of or an attempt to commit" an assault at the time Avondet arrested (detained) him is an issue that must be considered and decided upon.

If the Utah Supreme Court can rule as a matter of law that McFarland was "engaged in the commission of or an attempt to commit an assault" at the time Avondet arrested (detained) him, then the arrest was proper. On the other hand, if the Utah Supreme Court can rule as a matter of law that McFarland was not "engaged in the commission of or an attempt to commit an assault at the time Avondet

arrested (detained) him, then the arrest was improper. However, if the Utah Supreme Court decides that reasonable minds could differ as to whether or not McFarland was "engaged in the commission of or an attempt to commit an assault" at the time Avondet arrested (detained) him, then the Utah Supreme Court should let the jury decide this issue (under a preponderance of the evidence standard and not under a beyond a reasonable doubt standard as imposed upon Skaggs by the trial court in the first trial.

4. Even if the Utah Supreme Court was to decide as a matter of law that McFarland was not "engaged in the commission of or an attempt to commit an assault "at the time Avondet arrested (detained) him, Avondet still complied with the requirements of §77-7-6 as to "intention, cause and authority." If this court can infer from the actions and statements of McFarland

"She said I was free to go."
"I got up and left."

(P. 5 of Opinion.)

McFarland's "involuntary consent (acceptance) to be released from defendant's custody" (p. 5 of opinion) and hence a waiver of his right to be taken before a magistrate pursuant to §77-7-23 Utah Code Annotated, 1953, surely, in all fairness and justice this court should infer from the actions and statements of McFarland

She got out her handcuffs
I said: "Ok. Ok. I'll go back in."

(Record p. 95.)

McFarland's knowledge of Avondet's "intention, cause and authority to arrest," which under such circumstances, i.e. McFarland "actuall

being engaged in the commission of or an attempt to commit an offense (the assault)," is not required under §77-7-6.

Avondet, after being struck by McFarland, produced a set of handcuffs, which McFarland recognized and as a result, aborted the notion of further physical contact. Record, p. 93. At that point, McFarland was on notice of Avondet's intention to arrest. Undisputedly, Defendant was then taken to the manager's office. Record, p. 96. McFarland at least at that time, was certainly on notice of Avondet's authority as an employee of Skaggs and there, McFarland was informed by Avondet as to the cause of the arrest (assault). Record, p. 98. The reasonable inferences of these acts are adequate notice to embody the requirements of §77-7-6. Therefore, even assuming the applicability of the formalized steps, it is evident that McFarland was on constructive notice of each of the elements as enumerated in the statute.

This is not dissimilar from an undercover police officer, handcuffing, putting the arrestee in the patrol car, and informing him of the charges at the station. If that arrest would be valid under Utah law, so was Avondet's. See State v. Beard, supra.

5. This Court remanded this case to the trial court "for the limited purpose of trying the issue of punitive damages under the newly adopted standard of actual malice." In order to decide this issue fairly, the jury should not be instructed that the Supreme Court has already decided as a matter of law that Avondet did not make a proper arrest because she did not advise McFarland of her "intention, cause and authority to arrest" and thus the jury is

only to decide if Avondet made this improper arrest with malice (intentionally) or without malice (an honest mistake or lack of knowledge concerning the law which a private citizen is charged with knowing,) but instead, this court should let the jury decide themselves based upon all the facts as to whether or not Avondet's arrest of McFarland was proper or improper (i.e., if McFarland was "engaged in the commission of or an attempt to commit an assault on Avondet") and the jury should be able to decide this issue under a preponderance of the evidence standard and not under a beyond a reasonable doubt standard as the trial court instructed in the first trial, which was the primary basis for appeal in this case (the imposition by the trial court of a criminal standard in a civil trial). Thus, if the arrest was proper, award no damages; if improper, award compensatory damages; and if improper and malicious, award compensatory and punitive damages. For this court to remand this case for a trial on punitive damages only, can only result in an implication by the jury that the Supreme Court must feel that punitive damages are warranted in this case and the only question is the amount.

Based upon the foregoing. Defendant/Appellant Skaggs respectfully petitions the court for a rehearing.

DATED this 21st day of February, 1984.

MORGAN, SCALLEY & READING

Stephen G. Morgan

MAILING CERTIFICATE

I certify that I mailed a true and correct copy of the foregoing Peition For Rehearing to:

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postage prepaid this 21st day of February, 1984.

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BECAUSE THE COURT HAS ALREADY
PROPERLY RULED ON THE ISSUE

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