1960

Stratford L. Wendelboe v. Richard B. Jacobson, Billy Joe Lang and John H. Douglas : Petition for Rehearing and Supporting Brief

Utah Supreme Court

Sumner J. Hatch; Ray S. McCarty; Attorneys for Plaintiff and Appellant;

IN THE SUPREME COURT
of the
STATE OF UTAH

STRATFORD L. WENDELBOE,
Plaintiff and Appellant,

—vs.—

RICHARD B. JACOBSON, BILLY JOE LANG, and JOHN H. DOUGLAS,
Defendants and Respondents.

PETITION FOR REHEARING AND SUPPORTING BRIEF

SUMNER J. HATCH and
RAY S. McCARTY
Attorneys for Plaintiff and Appellant

INDEX

TABLE OF CASES CITED

STATUTES AND ORDINANCES

TEXTS

IN THE SUPREME COURT
of the
STATE OF UTAH

STRATFORD L. WENDELBOE,
Plaintiff and Appellant,

—vs.—

RICHARD B. JACOBSON, BILLY JOE LANG, and JOHN H. DOUGLAS,
Defendants and Respondents.

Case No. 9025

PETITION FOR REHEARING AND SUPPORTING BRIEF

The plaintiff in the above entitled case respectfully petitions the court to grant a rehearing on the ground and for the reasons that the opinion and decision of the court is erroneous in the following respects:

POINT 1: The court erred in holding that the evidence viewed in the light most favorable to the defendants was reasonably susceptible to the jury's finding in favor of the defendants. The evidence is clear and convincing that the plaintiff was arrested while trying to comply with the officers' demand.

POINT 2: The court erred in holding that Instruction 17, while ill advised and unnecessary, was not prejudicial.

WHEREFORE, the petitioner prays that the court re-examine the facts and the law to the end that the opinion correctly states such facts and that the law be correctly applied to such facts and the case be reversed.

SUMNER J. HATCH and
RAY S. McCARTY
Attorneys for Petitioner

CERTIFICATE OF COUNSEL ON PETITION FOR REHEARING

I, Sumner J. Hatch, one of the attorneys for the petitioner, certify that I have carefully re-examined the record of the above entitled case and in my opinion the foregoing petition for rehearing is meritorious. The record in the case should be re-examined to the end that the errors alleged in the petition be corrected.

SUMNER J. HATCH

BRIEF IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTORY STATEMENT

The petitioner feels that were the opinion and judgment of this court to stand as written in the above entitled case, it would cause great injustice to the plaintiff and also create dangerous precedents of law.

When this case was argued in the Supreme Court, it was argued before five justices. When the opinion came down, the plaintiff for the first time discovered that the case had been decided by a court of four justices. Had the plaintiff or his attorneys been consulted, they would have informed the court that they preferred that the case be discussed and decided by the full court. The petitioner respectfully requests that this petition be considered by, and if granted be heard by, a full court.

POINT I.

THE COURT ERRED IN HOLDING THAT THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE DEFENDANTS WAS REASONABLY SUSCEPTIBLE TO THE JURY'S FINDING IN FAVOR OF THE DEFENDANTS. THE EVIDENCE IS CLEAR AND CONVINCING THAT THE PLAINTIFF WAS ARRESTED WHILE TRYING TO COMPLY WITH THE OFFICERS' DEMAND.

This court, in paragraph 2 and 3, page 2, Case No. 9025, assumed that the jury made its finding on the basis of an arrest for failure of the plaintiff to produce a certificate of registration. Even viewing the evidence most

favorable to the defendants, yes, even taking their evidence alone without considering evidence and testimony of the plaintiff, there is not evidence to sustain the verdict. The rule of law stated in the Toomer case admittedly is the law, but if the jury makes its decision by viewing the evidence through distorted glasses (faulty instructions such as 7 and 17) the rule does not apply. To say that the instructions were faulty but not prejudicial oversimplifies the issue. *U.S. v. Morisett,* 342 U.S. 276.

With regard to Instruction No. 7, the evidence shows, construing only the defendants' evidence, that the plaintiff when approached by officer Jacobson produced identification (the driver's license, Exhibit 14). Then, at Jacobson's request, he proceeded to look for further identification. At that point, according to Jacobson's testimony (R. 254-5-6-7), the plaintiff started to go through the cards in his wallet. After he had passed his army identification card, Jacobson asked for his registration (R. 256). While Wendelboe was "digging for his registration," Jacobson ordered him out of the car, put him under restraint, had him put his hands on the police car, searched him, and then put him in the police car. An illegal arrest took place at this time. To this place and time, there is not a scintilla of evidence that the plaintiff had broken any law, even under Instruction 17, but from that moment on he was under arrest and actual physical restraint. By the defendant's own testimony, the plaintiff had his wallet in his hands "digging for his registration" when the arrest took place (R. 257).

Officer Douglas testified that Jacobson asked Wendelboe to get out of the car (R. 328-329). They went to the police car where Jacobson had him put his hands on top of the police car and searched him, taking a notebook and flashlight from his trench coat (R. 330).

Officer Lang testified that Wendelboe was taken out of the car, searched, and put in the police car (R. 354-5). Also, that Jacobson asked what wrecker he wanted for *his* car (R. 355). Lang testified that at the time Wendelboe was in his own car, he was not asked for further identification other than his driver's license (R. 352).

Richard Jacobson in his statement to L. R. Greeson (Exhibit 20) said:

> "While he was fumbling in his wallet, I asked him to be seated in the police car, that we might have more light . . . Since Wendelboe was reluctant to get into the car, I asked him what he was doing in that location, and he stated that it was none of my damn business what he was doing, stating that he was a citizen, and had a right to be there.
>
> "At this time, he was advised that he could consider himself in custody . . ."

In his supplementary report to the record of arrest (Exhibit 19) Jacobson states:

> "We attempted to check him out, however, this man refused to cooperate or answer any questions. He produced his driver's license. When asked what he was doing in this area he stated

> that it was none of our business. He was told that he could consider himself in custody, and was directed to sit in the police car."

Again there is no mention or reference to the registration. In the record of arrest (Exhibit 23) it is stated:

> "This man was arrested at 3:00 A.M. for being drunk and sitting in a car he was taken out of *his* car and placed in the police car and suddenly broke out of the police car and started to fight. . . ."

The record of arrest shows charges of assault and battery, drunk, resisting, and vagrancy, but makes no reference to the registration. Neither Lang nor Douglas mention the registration in their reports to the police department (Exhibits 21 and 22). In fact, this aspect of the case (the registration) never arose until approximately two months later when various amendments to the criminal charges were dismissed by the City Court upon Wendelboe's demurrers.

It is apparent from the entire record, and more exclusively from the testimony and reports of the defendants (without considering the plaintiff's evidence), that the plaintiff was arrested while he was getting information requested by the officers and at a time he had committed no crime whatsoever. All events thereafter were subsequent to a false arrest.

The arrest took place immediately after Wendelboe told Jacobson that what he was doing in the car was "none of their business" or "none of their damn busi-

ness," but as this court held in *Myers v. Collett,* 1 Utah 2d 406, 268 P(2d) 432:

> "Further, there is some evidence that the arrest would not have been made had it not been for the impudence of one of the boys toward the officers, which, of course, is not sufficient as a breach of the peace to warrant an arrest."

This court, in *Oleson v. Pincock,* 68 Utah 507, 251 Pac. 23, has set forth the law of arrest in this state. The law of arrest is further stated in *Roe v. Lundstrom,* 89 Utah 530, 57 P(2d) 1128, as set forth in plaintiff's brief on pages 37 and 38.

In *State v. Anselmo,* 46 Utah 137, 148 Pac. 1071, this court states:

> "The decision of the courts are practically unanimous that whether an officer was authorized to make an arrest, or whether the arrest was lawful or unlawful, when the facts are not in dispute, is a question of law for the court."

Looking at the record based on defendants' testimony and reports alone and not considering plaintiff's testimony, the evidence is clear and convincing that the plaintiff was arrested at a time when he had broken no law whatsoever, and the lower court was under a duty to decide the question of validity of the arrest as a matter of law and not submit it to a jury under Instructions 7, 9, 10, and 17. The entire evidence considered together shows only a failure to produce a registration because the acts of the officers prevented him from producing that registration which was in his wallet at all times.

The events transpiring after the illegal arrest, even though they may have been construed to constitute a subsequent misdemeanor, could not make valid the illegal arrest. If Wendelboe was arrested for failure to produce a registration on demand of a police officer, why wasn't he charged with that offense? Is it not apparent that when the arrest could not be justified on any of the numerous charges which were filed, the City attempted to rectify the false arrest on the basis that Wendelboe did not instantaneously produce an automobile registration?

POINT 2.

THE COURT ERRED IN HOLDING THAT INSTRUCTION 17, WHILE ILL ADVISED, UNNECESSARY AND ARGUMENTATIVE, WAS NOT PREJUDICIAL.

This court, after quoting disconnected portions of the trial court's Instruction No. 17, makes the statement:

> "We see nothing in this instruction inconsistent with the law of this jurisdiction" Supreme Court's Opinion 9025, page 2.

and in support of that statement cites 10-6-66, Utah Code Annotated 1953, 31-1-18, Salt Lake City Ordinances 1955, 76-28-54, Utah Code Annotated 1953, and 32-1-31, Salt Lake City Ordinances 1955. 10-6-66, Utah Code Annotated, reads as follows:

> "Police officers — Powers and duties. — All police officers of any city shall possess the powers conferred upon constables by law. It shall be the duty of the police force in any city at all times to preserve the public peace, prevent crime, detect

> and arrest offenders, suppress riots, protect persons and property, remove nuisances existing in the public streets, roads and highways, enforce every law relating to the suppression of offenses, and perform all duties enjoined upon them by ordinance."

See *Roe v. Lundstrom,* supra. 31-1-18, Salt Lake City Ordinances, is a word-for-word recitation of 10-6-66, Utah Code Annotated, citing as a caveat *Jackson v. Harries,* 65 Utah 282, 236 Pac. 234.

76-28-54, Utah Code Annotated states:

> "Resisting or obstructing officers in discharge of duty. — Every person who wilfully resists, delays or obstructs any public officer in discharging, or attempting to discharge, any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $1,000 or by imprisonment in the county jail not exceeding one year, or by both."

See *State v. Beckendorf,* 79 Utah 360, 368, 10 P(2d) 1073. Also see Annotation at 48 A.L.R. 746.

32-1-31, Salt Lake City Ordinances 1955, states:

> "Interfering with officer in discharge of duty prohibited. It shall be unlawful for any person in any way to interfere with, resist, molest or threaten any officer of Salt Lake City, while in the discharge of his official duties."

The trial court in Instruction No. 6 (R. 476) set forth the law with regard to these statutes and ordinances correctly as follows:

> "You are instructed that it shall be unlawful for any person in any way to interfere with, resist, molest, or threaten any officer of Salt Lake City while in discharge of his official duties."

Volume 1, Reid Branson's Instruction to Jury, 1960 Replacement, Section 101, approves quoting of an unambiguous statute or ordinance in an instruction. This the trial court did in Instruction 6, Instruction 9, and Instruction 10. This court has stated that impudence or sauciness to an officer is not a violation substantiating or authorizing an arrest. *Myers v. Collett,* supra.

After the statement in Instruction 6, by its Instruction 17 the trial court goes into an argumentative discourse at R. 483 to R. 484 that entirely nullifies and contradicts Instructions 6, 7, 9 and 10, and leaves such a state of confusion that said instruction must be prejudicial.

In addition to the often repeated, emphasized phrases which this court at page 2, paragraph 6, Opinion No. 9025, admits to be unnecessary, ill advised, and argumentative, the instruction states:

> "And such person if he willfully does or *says* anything which resists, interferes with, delays or obstructs the police officer in the legal exercise of his duties, such person at that moment by such *statement* or conduct itself is guilty of a crime and public offense." (Instruction 17).

This instruction is not only contradictory to Instructions 6, 7, 9 and 10, so as to be misleading (see Vol. 1, Reid Branson's Instructions to Jury, 1960 Replacement, Sec-

tion 104, page 298), but gives undue prominence to a particular feature or phase of the case (see Reid Branson, supra, Section 105), and gives the law incorrectly regarding that particular feature in that Instruction 17 states that it is a crime to say anything or make a statement which an officer might regard as interfering, see *Myers v. Collett,* supra.

It cannot be denied that under Instruction 17 the jury could have found the plaintiff liable to arrest due to his statement "none of your damn business, I have my rights" as readily as they could have for a failure to produce a registration (see Point 1), *Konold v. Rio Grande W. R.R. Co.,* 21 Utah 379, 60 Pac. 1021.

The instruction further uses the word "possibility" in lieu of "probability", and uses the phrase that he "*might* be *about* to commit any public offense whatsoever." Reading of the full instruction must necessarily leave a jury with the idea that if a person should so much as use the words "just a minute" to an officer, he would be subject to arrest for delay and interference. This instruction cannot be reconciled with the law of arrest as stated by the court in Instructions 9 and 10 and the last paragraph of Instruction 6. The instruction not only does not correctly state the law, but has all the vices denounced by the texts, namely, it is argumentative, unduly emphasizes one phase of the case, and comments on the evidence.

It is stated in *U.S. v. Morisett,* supra:

> "Had the jury decided the case and found for the defendants on proper instructions it would be the end of the matter, but juries are not bound by what seems inescapable logic to judges."

In the Wendelboe case the jury was out for half a day, returned the next morning and deliberated for another half day before coming in with a verdict. Under the instructions complained of in this demand for rehearing and the plaintiff's original brief, the jury must have been under a state of confusion which left no other possibility than the verdict arrived at. Due to the erroneous instructions and the state of the evidence from the record, a rehearing should be allowed and the case reversed.

CONCLUSION

For the reasons that (1) the evidence is clear and convincing that Wendelboe was placed under arrest and searched before being given a chance to produce requested registration, and (2) Instructions 7 and 17 cannot be reconciled with Instructions 9 and 10 because Instruction 17 is not or should not be the law of this jurisdiction and does violence to the constitutional rights of all persons accosted by police officers, the plaintiff respectfully requests that the court consider this petition and brief and grant a rehearing of the appeal before a full court.

Respectfully submitted,

SUMNER J. HATCH and
RAY S. McCARTY

Attorneys for Plaintiff and Appellant