

1960

State of Utah v. Tommy Otis Fair : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,
— vs. —
TOMMY OTIS FAIR,
Defendant and Appellant.

Case
No. 9244

BRIEF OF RESPONDENT

UNIVERSITY OF UTAH

JUL 10 1967

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

Appellant Fair was convicted January 20, 1960, in Third District Court of unlawful possession of a narcotic drug. He had competent counsel at the trial but now represents himself. The evidence showed Fair was visiting the Abyss, a Salt Lake City night club, when two police officers, acting on an informant's tip, approached him and asked him to step outside, where he was searched and arrested. (T. 24, 29) The officers found cigarettes which later proved to contain marijuana. He was sentenced to prison for the statutory term.

STATEMENT OF POINTS

POINT I.

APPELLANT'S CONVICTION SHOULD NOT BE REVERSED BECAUSE OF THE MANNER OF HIS SEARCH AND ARREST BY THE POLICE OFFICERS.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A BILL OF PARTICULARS AS TO CERTAIN FACTS NOT INTRODUCED INTO EVIDENCE.

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

POINT IV.

JUROR RIGBY DID NOT INDICATE THAT HE WOULD VOTE FOR A VERDICT PARTIAL TO EITHER SIDE.

ARGUMENT

POINT I.

APPELLANT'S CONVICTION SHOULD NOT BE REVERSED BECAUSE OF THE MANNER OF HIS SEARCH AND ARREST BY THE POLICE OFFICERS.

Because of the language and style of appellant's brief, prepared without assistance of counsel, isolating the points relied upon has been difficult. Respondent has attempted to do so, however, and to answer them in order.

The first point seems to be that appellant was improperly convicted in that he was accompanied from the night club to an alley and there searched by the officers, without a warrant, and arrested. (T. 24, 29) The search was an incident to Fair's arrest and was conducted almost simultaneously with it. (T. 31)

Admittedly, there is some law tending to require the arrest to be made prior to the search. If that is true in Utah and if the search and arrest are not to be deemed a simultaneous act, the search being incident to the arrest, appellant may possibly have a cause of action against the arresting officers; and the officers may be in technical violation of the law. However, none of the events that occurred can in any way invalidate the evidence, nor does the use thereof violate the Utah Constitution.

The leading case in this matter is *State v. Aime*, 62 U. 476, 220 P. 704, 32 A. L. R. 375. It was held thus that articles taken from an accused are not inadmissible in evidence against him because taken in violation of the constitutional provision of the Utah State Constitution. The court further held that the Fourth and Fifth Amendments to the Federal Constitution do not apply to state governments or proceedings in state courts, and that the decisions of the Supreme Court of the United States as to admissibility of evidence under the Fourth and Fifth Amendments to the Federal Constitution are not binding on state courts in interpreting similar provisions of their own state constitutions. The court stated:

“* * * we are led by the force of what we deem the better reason to conclude with the vast major-

ity of state courts that the admissibility of evidence is not affected by the illegality of means through which it has been obtained, * * *."

As to its reasoning for this decision, the Utah court wrote as follows:

"* * * The rule and the legal principles supporting it are stated in 4 Wigmore on Evidence, 2d ed. § 2183, as follows: 'Necessity does not require, and the spirit of our law does forbid, the attempt to do justice incidentally and to enforce penalties by indirect methods. An employer may perhaps suitably interrupt the course of his business to deliver a homily to his office boy on the evils of gambling or the rewards of industry. But a judge does not hold court in a street car to do summary justice upon a fellow passenger who fraudulently evades payment of his fare; and, upon the same principle, he does not attempt, in the course of a specific litigation, to investigate and punish all offenses, which incidentally cross the path of that litigation. Such a practice might be consistent with the primitive system of justice under an Arabian sheik, but it does not comport with our own system of law. It offends, in the first place, by trying a violation of law without that due complaint and process which are indispensable for its correct investigation. It offends, in the next place, by interrupting, delaying and confusing the investigation in hand, for the sake of a matter which is not a part of it. It offends further in that it does this unnecessarily and gratuitously; for, since the persons injured by the supposed offense have not chosen to seek redress or punishment directly and immediately, at the right time and by the proper process, there is clearly no call to attend to their complaints in this indirect and tardy manner. The

judicial rules of evidence were never meant to be an indirect process of punishment. It is not only anomalous to distort them to that end, but it is improper (in the absence of express statute) to enlarge the fixed penalty of the law, that of fine or imprisonment, by adding to it the forfeiture of some civil right through loss of the means of proving it. The illegality is by no means condoned; it is merely ignored. For these reasons it has long been established that the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' "

Notwithstanding whatever cause of action Fair may have or whatever liability, if any, may accrue to the officers, appellant's conviction on the basis of the seized evidence is valid and should not be overturned.

POINT II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A BILL OF PARTICULARS AS TO CERTAIN FACTS NOT INTRODUCED INTO EVIDENCE.

Appellant Fair, through counsel, and by written motion, requested a Bill of Particulars on January 5, 1960, as to "the names of all persons known to the prosecuting attorney or to officers Schoenhardt, Hann, Adair, Sperry, Kent or Park, or any of them, who claimed to have knowledge of defendant's alleged possession of marijuana prior to defendant's arrest on or about November 2, 1959." (R. 10)

Previously, on January 4, 1960, the judge had indicated in response to an oral request by defendant's counsel that he would not at that time require the district attorney to give the indicated information because of its immateriality in the case, but that defendant could file a formal motion for a Bill of Particulars by January 6, 1960. (R. 9)

After the January 4th hearing, the district attorney verbally and by authorization of the court gave certain particulars of his case to defendant's attorney.

Another hearing was held on January 11, 1960 (R. 69), at which time the court considered the formal motion for a Bill of Particulars relative to the specific question raised above and again refused to require the district attorney to give defendant any information as to informants whose tips had led to arrest — again on the grounds of immateriality as to the charge which was brought under provisions of 58-13-2, U. C. A., 1953 as amended. There is no question that the judge was correct in not requiring the district attorney to answer extraneous questions which did not relate to any evidence introduced in the case and which were not essential to the elements thereof. Here possession of the drug is the only element of the charge, and the police officers alone discovered the drugs on his person. Why they searched him is not material at all. This is in clear accord with the statute providing for such bills, 77-21-9, U. C. A. 1953.

No testimony about or by any informer was given by

the state at the trial and, therefore, the court's ruling was in all respects proper.

If the defendant felt aggrieved by the judge's ruling, he should have made a motion to quash in accordance with the provisions of Title 77-23-3, U.C.A. 1953, and his failure to do so constituted a waiver of the alleged defect.

POINT III.

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

Appellant claims the court erred in its instructions to the jury. He does not point out the number of the instructions to which he objects and does not properly identify them in any other way. He refers to certain pages of the transcript, but such references do not deal with instructions at all, nor does he offer any worthwhile arguments against the instructions as a whole.

Respondent cannot answer this point because of the complete absence of information as to its nature.

POINT IV.

JUROR RIGBY DID NOT INDICATE THAT HE WOULD VOTE FOR A VERDICT PARTIAL TO EITHER SIDE.

At T. 14, Juror Rigby made an inadvertent slip of the tongue when asked if he could give an impartial decision. At line 18, he used the word "partial." Immediately, he recognized his error and corrected it without prompting to read, at line 20, "impartial."

CONCLUSION

Appellant has not suffered any prejudicial error. Due process has not been violated and his appeal should be dismissed.

Respectfully submitted,

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