1967

State of Utah v. Lindell Ray Newton : Brief of Respondent

In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-v-
LINDELL RAY NEWTON,
Defendant-Appellant.

Case No. 10626

BRIEF OF RESPONDENT

Appeal from the judgment of the District Court of Grand County, Honorable A. H. Ellett, Judge

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
-v-
LINDELL RAY NEWTON,
Defendant-Appellant.

Case No. 10638

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an appeal from a conviction and sentence for the crime of robbery.

DISPOSITION IN LOWER COURT

The appellant was jointly tried with his co-defendant before a jury on April 22, 1966, before the Honorable A. H. Ellett, then one of the judges of the Third Judicial District, sitting by invitation in the Seventh Judicial District. Both defendants were found guily by a jury verdict signed April 23, 1966, of the crime of robbery as charged in the information. Appellant was sentenced to be confined to the Utah State Prison for an indeterminate period of not

less than five years nor more than life, as provided by law.

RELIEF SOUGHT ON APPEAL

Respondent requests that the judgment of the trial court be affirmed.

STATEMENT OF FACTS

The key witnesses produced by the State at the trial were Leonard K. Jewkes and Williams J. Himes, Jr., both patrolmen with the Utah Highway Patrol (Tr. 99 and 130). Officer Jewkes testified that on the evening of October 8, 1965, he and officer Himes were partolling Interstate 70 near Crescent Junction. The officers observed an automobile traveling in the opposite direction, which failed to dim its lights for the car immediately in front of the patrol car (Tr. 100). The patrol car turned and followed the car and clocked it at a speed in excess of 88 miles per hour, 18 miles per hour in excess of the posted 70 miles per hour speed limit. The officers stopped the automobile (Tr. 101), and the driver was identified as Sherrill Chestnut, III (Tr. 101, 102). Officer Jewkes detected alcohol on Mr. Chestnut's breath and decided to administer a field test to determine whether the driver was driving under the influence of alcohol. Mr. Chestnut failed to hit his heel to his toe three times and officer Jewkes placed him under arrest for driving under the influence of alcohol (Tr. 102, 133). Thereafter officer Himes searched the interior of the car, and defendant Newton, who had

been sleeping in the back seat of the car, awoke (Tr. 103). In searching the automobile, officer Himes found a loaded revolver in the glove compartment. Defendant Chestnut stated that the gun belonged to him (Tr. 103). Officer Himes advised Mr. Chestnut that he would have to cite him for carrying a loaded fire arm in the automobile (Tr. 104). After finding that Mr. Chestnut had no registration papers or proof of ownership, radio contact was made with Price, Utah, to determine whether Chestnut was wanted for any previous crimes.. A subsequent check was made on defendant Newton (Tr. 105). While waiting for the response from Price, Utah, the officers decided to search the automobile for further evidence. The trunk of the car was searched and three six-packs of beer and an Air Force overnight bag containing punches, chissels, gloves, a hammer, and a glass cutter was found (Tr. 106). It was then that defendant Chestnut produced a pistol and ordered the officers to raise their hands (Tr. 107-138). Defendant Newton relieved the officers of their side arms (Tr. 108-138) and the officers were directed to go to a fence on the north side of the highway. At this point Mr. Newton fired a shot in front of officer Jewkes. (Tr. 110-140). When the troopers reached the fence Mr. Chestnut took officer Jewkes' wallet containing $118.00 while defendant Newton held a gun on the officers (Tr. 110-111, 141). The officers were then handcuffed to a telephone pole (Tr. 113-114, 143).

The defendants fled in their automobile, and after taking refuge in a truck, were apprehended by the police (Tr. 172). When the defendants were

apprehended the officers' revolvers were still in their possession (Tr. 175). Officer Jewkes' wallet was found in the defendant's abandoned automobile with only $8.00 missing. Officer Jewkes testified that the $8.00 was located in the wallet, but that the $10.00 bill was located among some folded papers and that the $100.00 bill was located in a back pocket of the wallet (Tr. 117).

ARGUMENT

POINT I

A. APPELLANT CANNOT RAISE THE ISSUE OF PRETRIAL PUBLICITY FOR THE FIRST TIME ON APPEAL.

B. THERE IS NO SHOWING THAT APPELLANT WAS IN ANY WAY PREJUDICED BY PRETRIAL PUBLICITY.

Appellant argues that he was deprived of a fair and impartial trial due to the publicity he received prior to the trial. Nowhere in the record does it appear that appellant moved for a change of venue or that appellant was overly concerned about local prejudices. It is submitted that appellant may not raise an issue on appeal that was not raised in the trial court. **Carson v. Douglas,** 12 Utah 2d 424, 367 P.2d 462 (1964); **Huber v. Deep Creek Irrigation Company,** 6 Utah 2d 15, 305 P.2d 478 (1956).

It is further submitted that there is no showing that appellant was prejudiced by pretrial publicity. It is well established that it is not a denial of due process to refuse to declare a mistrial where the

juror's who had read news articles concerning the alleged crime stated that they have not been influenced by the reports, **U. S. v. Kelly,** 349 F.2d 720 (C.A.N.Y. 1965), **cert. den.** 384 U. S. 947 (1966), and where cautionary instructions had been given. **U. S. v. Lombardozzi** 335 F.2d 414 (C.A.N.Y.) **cert. den.** 379 U. S. 914 (1964). In the instant case the trial court inquired of every prospective juror whether they knew something about this case and if they did, the, whether they had formed an opinion concerning the guilt of the defendants. Every juror indicated that no opinion had been formed by them and that they felt they could be objective about the issues.

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY IN THE LESSER OFFENSE OF ASSAULT, SINCE THE ISSUE WAS NOT RAISED BY THE EVIDENCE.

The appellant contends that the trial court erred in refusing to give a requested instruction in the claimed lesser included offense of assault. The appellant had requested such an instruction and an exception was duly taken (Tr. 209).

It is well settled in this state that an instruction on a lesser included offense is not required, unless the evidence raises the issue for the jury's consideration. It is submitted that even assuming assault, as defined by Utah Code Ann. § 76-7-1 (1953), is a lesser included offense of robbery, the evidence in the instant case did not raise the issue or warrant the jury's consideration of an assault. Therefore, it was not

error for the trial court to refuse to instruct on the lesser offense of assault. **State v. Angle,** 61 Utah 432, 215 Pac. 531 (1923); **State v. Ferguson,** 74 Utah 263 279 Pac. 55 (1929); **State v. Mitchell,** 3 Utah 2d 70, 278 P.2d 618 (1955).

In **State v. Ferguson,** supra at 267, 279 Pac. 56, Justice Straup (concurring) noted:

> I concur in the result. I concur in the general statement as announced in some of the texts and cases that when there is no evidence to support a conviction of a lesser offense, a court is not required to submit it to a jury, and concur in the statement in the prevailing opinion that instructions as to lower grades of a charged offense, when embraced and included therein, should be given when warranted by evidence.

In **State v. Mitchell,** supra, at 3 Utah 2d 76, 278 P.2d, Justice Crockett (concurring) stated:

> I agree that under the circumstances of this case it was not prejudicial error for the court to fail to instruct on lesser included offenses. However, under some circumstances where the evidence would plainly indicate that the jury should properly consider lesser offenses, I think it might be error for the trial court not to instruct with respect to them, even if counsel made no request.

Certainly this is not support for appellant's proposition that it is the duty of the trial court to instruct the jury as to every lesser, included offense.

Most recently in **State v. Dodge,** 18 Utah 2d 63 at 64, 415 P.2d 212 at 213 (1967) where the defendant was apprehended inside a building while attempt-

ing to peel a safe, this court said of appellants' requested instruction on the lesser offense of unlawful entry:

> The facts indisputably show he attempting to peel the safe. The jury would have been composed of unreasonable men had it even considere dthat the defendant had "unlawfully entered" for the altruistic "intent to damage property or to injure a person or annoy the peace and quite of any occupant therein." The trial court also would have been an unreasonable person had he given such an instruction.

Respondent submits that it is not error for the trial court to refuse to instruct the jury as to lesser offenses included in the charge when the evidence shows that the defendants, if guilty at all are guilty of the offense charged. **People v. Ray,** 162 Cal. App.2d 308, 328 P.2d 219 (1958).

Since appellant concedes that the crime of robbery might occur without using a deadly weapon, it is apparent that assault with a deadly weapon is not a necessary included offense in the crime of robbery as assault with a deadly weapon requires proof of a separate fact not necessarily included in the crime of robbery and the lesser offense of assault is not embraced within the legal definition of robbery. See **State v. Rohletter,** 108 Utah 452, 160 P.2d 963 (1945).

Appellant argues that since it is the natural tendency of a jury to convict an accused who has conducted himself "somewhat improperly" where the jury is given the choice of either acquitting or

convicting, the trial court should instruct the jury in fenses.

Utah Code Ann. § 76-1-8 (1953) charges the court with the duty to pass sentence and impose the punishment prescribed. It is submitted that in allowing the jury to consider lesser included offenses when not warranted by the evidence, the jury would be invited to reach a compromise verdict, 53 Am. Jur. § 789 (1945) and it would have the effect of allowing the jury to determine the punishment of the accused. As it is not the function of the jury to determine punishment, the jury should not be given the power to convict of lesser offenses when not raised by the evidence.

It is further submitted that even if the officers were engaged in an unlawful arrest, appellant would not be excused or justified in committing robbery. See **Hardeman v. State,** 14 Ala. App. 35, 70 So. 979 (1916).

POINT III

THE TRIAL COURT DID NOT ERR IN ALLOWING INTO EVIDENCE TESTIMONY CONCERNING BURGLAR TOOLS DISCOVERED AS THE RESULT OF A LAWFUL SEARCH.

It is submitted that the search of the automobile was a lawful search incident to arrest. When the car in which appellant was riding was stopped, a misdemeanor had been committed in the officers presence.

Utah Code Ann. § 41-6-46(2) (1960) provides that

the speed in excess of the limits shall be prima facie evidence that the speed is unlawful.

Since the driver of the automobile in which Mr. Newton was riding was traveling in excess of the posted speed limit, the above statute was violated. Utah Code Ann. § 41-1-17 (1960) expressly required officers Himes and Jewkes to stop the vehicle and in so doing effect the driver's arrest. Further, Utah Code Ann. § 41-6-44 (1960) makes it a misdemeanor for a person under the influence of alcohol to drive or be in control of a vehicle within the state.

The restraint under these circumstances was a lawful one and the search made pursuant to the lawful arrest was legal. **United States v. Rabinowitz,** 339 U.S. 56 (1950).

It is submitted that the testimony concerning the search of the automobile and discovery of the bag conaining punches, chissels, gloves, a hammer, and a glass cutter was part of the res gestae of the crime and the trial court had discretion to allow testimony concerning events leading up to robbery. See **Balle v. Smith** 81 Utah 179, 17 P.2d 224 (1932).

POINT IV

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT APPELLANT'S MOTION FOR SEPARATE TRIALS.

Utah Code Ann. § 77-31-6 (1953) provides:

> When two or more defendants are jointly charged with any offense, whether felony or mis-

> **demeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials,**

This court has approved the above cited statute in **State v. Rivenburgh,** 11 Utah 2d 95, 355 P.2d 689 (1960) wherein it held that it is within the discretion of the court to order separate trials where two or more defendants are jointly charged with any offense.

It is well established that one aiding and abetting others in the commission of the crime of first degree robbery is guilty as a principal, regardless of the acts committed by him personally.

In **State v. Jones,** 45 Hawaii 246, 365 P.2d 460 (1961) the court held that where a person with knowledge of the unlawful intent of companions stood by with gun in hand and acquiesced while his companions committed robbery, he could be indicted and convicted as a principal.

It is submitted that where appellant held a gun on both officers while his companion robbed officer Jewkes of his wallet, his intent is clearly evidenced by his acts. No testimony of Sherrill Chestnut under this circumstance could establish that appellant did not intend to aid and abet his companion in robbery.

CONCLUSION

The appellant can not raise the issue of pretrial publicity for the first time on appeal.

As evidence did not raise the issue of lesser included offenses, and the trial court correctly refused to grant appellant's requested instruction thereon.

The search of the automobile in which appellant was riding was incident to a lawful arrest and therefore legal. The evidence so obtained was therefore legal and part of the res gestae of the crime and the testimony concerning the burglar tools was therefore admissible.

The trial court correctly denied appellants' motion for separate trials as no defense could be raised at separate trial which could not have been raised at a trial where defendants were tried together. Appellant has not demonstrated wherein he was prejudiced.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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