1984

State of Utah v. Harley F. Willett : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19277
STANLEY E. WILLETT,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE SENTENCE ENTERED AFTER A JUDGMENT OF GUILTY OF SECOND-DEGREE MURDER IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, THE HONORABLE ALLEN B. SORENSEN, PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with first-degree murder in violation of Utah Code Ann. § 76-5-202, 1953, as amended, in the shooting death of Dan Okelberry on November 20, 1982. Pursuant to a plea arrangement, the charge was amended to second-degree murder in violation of Utah Code Ann. §§ 76-5-203 and 76-2-202, 1953, as amended.

DISPOSITION IN THE LOWER COURT

On May 19, 1983, appellant pled guilty to the amended charge before the Honorable Allen B. Sorensen in the Fourth Judicial District Court in and for Utah County. Judge Sorensen imposed sentence that same day of an indeterminate term of five years to life in the Utah State Prison, an additional year under Utah Code Ann. § 76-3-203(1) to run consecutively and an additional term of five years under § 76-3-203(1) to run consecutively.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the sentence imposed by the court below.

STATEMENT OF THE FACTS

On May 19, 1983, Appellant waived his right to a preliminary hearing and indicated a desire to enter a plea of guilty to the amended information (R. 99, 121). The court heard testimony from two psychiatrists, Dr. Phillip Washburn and Dr. Delbert Pearson, about appellant's competency for the purpose of showing he was not psychotic, that he understood the nature of the charges and was able to aid in his own defense (R. 100, 101, 109). Both experts stated that appellant was not psychotic and was able to understand and aid in his defense (R. 107-108, 111). Thereafter, the court found appellant competent to stand trial and granted leave to withdraw the not guilty plea previously entered (R. 114, 121).

Appellant entered a plea of guilty to the charge of second-degree murder stating that he aided his father in killing Dan Okleberry (R. 122, 126). The court found the guilty plea to be voluntary (R. 126) after questioning appellant on whether he received promises or threats inducing the guilty plea (R. 124). Appellant stated that he also received no promises concerning the sentence he would be given on the charge (R. 124-125).

Prior to sentencing appellant, the lower court explained to him the possible penalty for second-degree murder and the enhancement penalties of an additional one year to run consecutively plus up to five additional years to run consecutively (R. 123). Appellant acknowledged understanding the possible penalties and entered no objection to their imposition at any time (R. 123).

Appellant waived a presentence investigation and requested immediate sentencing (R. 127). The Court sentenced appellant on May 19, 1983 imposing both enhancement penalties (R. 129). No objections were raised by appellant at the time of sentencing as to the propriety of the sentence imposed.

ARGUMENT

POINT I

THE TRIAL COURT'S JUDGMENT SHOULD BE AFFIRMED BECAUSE APPELLANT MAKES NO REFERENCE TO THE RECORD SUPPORTING HIS STATEMENT OF FACTS.

In State v. Tucker, Utah, 657 P.2d 755 (1982), this Court affirmed the trial court's judgment in part due to the appellant's failure to make any reference to the record in his statement of the facts:

> A separate and independent basis for the affirmance of the trial court is that the defendant failed to refer to any portion of the record that factually supports his contentions on appeal. This Court will assume the correctness of the judgment below if counsel on appeal does not comply with the requirements of Rule 75(p)(2)(2)(d), Utah Rules of Civil Procedure, as to making a concise statement of facts and citation of the pages in the record where they are supported.

Id. at 756-757, citing Lepasiotes v. Dinsdale, 121 Utah 359, 242 P.2d 297 (1957). See also State v. Vigil, Utah, 661 P.2d 947, 948 (1983); State v. Steggell, Utah, 660 P.2d 252, 253 (1983).

Appellant fails to refer to the record to support any of his factual statements. Thus, he has violated Rule 75 (p)(2)(2)(d), Utah Rules of Civil Procedure, and the trial court's judgment should be affirmed.

POINT II

APPELLANT WAIVED THE ISSUE OF AN IMPROPER SENTENCE BY FAILING TO OBJECT AT TRIAL.

After appellant entered his guilty plea, Judge Sorensen explained the possible penalties for second-degree murder, including the enhancement penalties under § 76-3-203(1). The transcript reveals the following exhange:

> THE COURT: You understand Mr. Willett that the penalty for this offense can be from five years to life in the Utah State Prison?

MR. HARLEY WILLETT: Yes I do.

THE COURT: And that it can be enhanced with an additional one year to run consecutively?

MR. HARLEY WILLETT: Yes.

THE COURT: And it may be enhanced to have an additional sentence of up to five years to run consecutively?

MR. HARLEY WILLETT: Yes.

(R. 122-123). Thereafter, appellant waived preparation of a presentence report and chose to have sentence imposed immediately (R. 127). The court imposed sentence including both enhancement penalties. Appellant raised no objection to the enhancement penalties at the time of sentencing, but has raised the issue for the first time in this appeal. As this Court has stated many times, it is the general rule that matters raised for the first time on appeal without timely objection in the trial court will not be reviewed. State v. Mitchell, Utah, 671 P.2d 213, 214 (1983); State v. Steggell, Utah, 660 P.2d 252, 254 (1983). Because this issue is raised for the first time on appeal, this Court should not review it but should consider it waived.

POINT III

IMPOSITION OF ENHANCEMENT PENALTIES UNDER § 76-3-203(1) IS CONSTITUTIONAL AND DOES NOT CONSTITUTE DOUBLE JEOPARDY.

Appellant complains that imposition of both enhancement penalties under § 76-3-203(1) resulted in his being twice placed in jeopardy and therefore his sentence was unconstitutional. He argues that either one enhancement penalty or the other may be imposed, but not both because the United States Supreme Court held that imposition of two enhancement penalties is always improper in Simpson v. United States, 435 U.S. 6 (1977).

Simpson did not, however, hold that imposition of more than one firearms enhancement penalty is always impermissible. In that case, the defendant was charged with aggravated bank robbery. The statute setting out the punishment for aggravated bank robbery itself enhanced the punishment for the commission of the crime using a dangerous weapon. The Court held, therefore, that the separate general statute imposing a firearms enhancement penalty could not also be invoked against the defendant. The result was partially supported by the principle that a specific statute controls over a more general statute dealing with the same subject matter. See Preiser v. Rodriguez, 411 U.S. 475, 489-490 (1973). The Court also stressed that Congress, in its

discussions over the federal firearms statute,[1] explicitly stated that the statute was not to be used where specific statutes already provided for an enhanced penalty for use of a firearm. Id. at 12-15.

The Utah firearms enchancement statute is distinguishable from the federal firearms statute construed in Simpson. Utah Code Ann. § 76-3-203(1) states:

> A person who has been convicted of a felony may be sentenced to imprisonment for an indeterminate term as follows: (1) In the case of a felony of the first degree, for a term at [sic] not less than five years and which may be for life but if the trier of fact finds a firearm or a facsimile or the representation of a firearm was used in the commission or furtherance of the felony, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently

The wording of the Utah statute explicitly authorizes imposition of both a one year mandatory term and up to a five year discretionary term. The United States Supreme Court recently held that multiple sentences do not violate the Double Jeopardy Clause where a statute clearly authorizes

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[1] 18 U.S.C. § 924(c) provides in part: "Whoever . . . uses a firearm . . . or carries a firearm unlawfully during the commission of any felony . . . shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years."

cumulative punishments. Missouri v. Hunter, ___U.S.___, 103 S.Ct. 673 (1983). "[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Id. at 678. See also, Government of Virgin Islands v. Soto, 718 F.2d 72 (3d Cir. 1983).

There is no conflict here as in Simpson between a general statute and a specific statute both providing punishment for the same offense. Here, there is only one statute, the clear import of which is to allow discretionary cumulative punishments for the use of a firearm. This Court must construe a statute "according to the fair import of [its] terms to promote justice and to effect the objects of the law." Utah Code Ann. § 76-1-106 (1978). It is a longstanding rule of statutory construction that reviewing courts defer to the evident purpose of the Legislature to attain a certain end. State v. Navaro, 83 Utah 6, 26 P.2d 955 (1933). Additionally, in determining this legislative intent, courts should consider the purposes sought to be accomplished through enactment of a particular statute. State v. Helm, Utah, 563 P.2d 794 (1977). Insuring proper effect to legislative intent and purpose is a primary consideration. Parson Asphalt Production, Inc. v. Utah State Tax Commission, Utah, 617 P.2d 397 (1980); Millett v. Clark Clinic Corp. Utah, 609 P.2d 934 (1980).

The purpose of § 76-3-203(1) is to impose an additional penalty on defendants who use a firearm in the commission of a crime and to increase that penalty where the circumstances of the crime suggest a more stringent sentence is appropriate. Clearly the Legislature in the case of § 76-3-203(1) intended that the trial court be left with discretion to impose an additional enhancement penalty in appropriate cases. Nothing in the wording of the section sets forth an intent to prohibit cumulative punishments. For this reason, imposition of a discretionary cumulative penalty is not prohibited by the Double Jeopardy Clause. Hunter, 103 S.Ct. at 673.

Appellant does not assert that the trial court abused its discretion in imposing the second enhancement penalty. Even if that were an issue in this case, this Court will not overturn a sentence that is within the statutory scheme unless it is clearly excessive or a clear abuse of discretion. State v. Gerrard, Utah, 584 P.2d 885, 887-888 (1978). No such showing has been made in this case. The trial court's sentence should, therefore, be affirmed.

CONCLUSION

Appellant raises the issue of double jeopardy for the first time on appeal and, therefore, has waived the issue. A separate ground for summary affirmance is that appellant failed to cite to the transcript to support his statement of facts.

Even if this Court reaches the double jeopardy claim, appellant's sentence should be affirmed because the imposition of a second enhancement penalty was clearly contemplated by the Legislature and thus is not violative of the Double Jeopardy Clause.

RESPECTFULLY submitted this 1st day of June, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Michael D. Esplin, attorney for appellant, P.O. Box L, Provo, Utah 84603, this 1st of June, 1984.

Kathleen D. Kellerhals