

1992

The State of Utah v. Lawrence Pitts : Petition for Rehearing

Utah Supreme Court

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David L. Wilkinson; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

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IN THE SUPREME COURT OF THE STATE OF UTAH
920290

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
LAWRENCE PITTS, : Case No. 20290
Defendant/Appellant :

APPELLANT'S PETITION FOR REHEARING

Petition for reconsideration of a per curiam decision by the Utah Supreme Court filed January 28, 1986 in a appeal from a conviction and judgment of Burglary, a Felony of the Third Degree, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

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FILED
FEB 11 1986

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-v- :
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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff/Respondent :
-v- :
LAWRENCE PITTS, : Case No. 20290
Defendant/Appellant :

APPELLANT'S PETITION FOR REHEARING

STATEMENT OF THE CASE

This is a petition for rehearing of a per curiam decision filed by this Court on January 28, 1986. Originally this case was an appeal from a conviction and judgment against Lawrence Pitts for the offense of Burglary, a Felony of the Third Degree, in violation of Utah Code Ann. §76-6-202 (1953 as amended). A jury found him guilty following a trial which occurred on September 25-26, 1984, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding. The same court sentenced Mr. Pitts to an indeterminate term of incarceration of from zero to five years on September 28, 1984.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant (Appellant's Brief at 1-3).

ARGUMENT

In its per curiam opinion, State v. Pitts, Opinion No. 20290 (Utah 1986), the Court did not address an argument

advanced by appellant after the briefing process but before a decision in the case.

On November 5, 1985, counsel for the appellant sent a letter to the Clerk of the Supreme Court. (Addendum A) According to the Clerk of the Court, the letter was docketed and distributed to the justices on November 8, 1985. In the letter appellant's attorney requested permission to incorporate two then-recently decided cases into appellant's brief pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure. Those cases were State v. Chambers, 709 P.2d 321 (Utah 1985) and State v. Pacheco, 20 Utah Adv. Rep 18 (Utah 1985), both filed on October 21, 1985. To facilitate the incorporation, appellant's attorney sought permission to file a supplemental brief. Nothing was heard from the Court regarding this request.

No provision of the Utah Rules of Appellate Procedure directly covers the present situation. However, sections of two rules seem to be applicable. First, Rule 24(j) states:

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after his brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, with a copy of [to] all counsel, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within seven days of filing and shall be similarly limited.

While this section seems to be limited to issues previously raised either in the original brief or at oral argument, such

a limitation is not specifically expressed. Indeed, a reasonable inference is that any "pertinent and significant" authority having impact on a party's case could be included under this rule. Counsel for the appellant called attention to "pertinent and significant" authorities as soon as those authorities became available. However, nothing in the per curiam decision in this case indicates that those authorities were considered. Furthermore, appellant's counsel should have been allowed to file a supplemental brief. Rule 24(c) of the Utah Rules of Appellate Procedure states, in part:

Reply briefs shall be limited to answering any new matter set forth in the opposing brief. No further briefs may be filed except with leave of court. (emphasis added)

The closing paragraph of counsel's November 5 letter requested precisely what Rule 24(c) demands-- permission of the Court to file a supplemental brief. However, the letter went unanswered and the permission was denied by inaction.

In Lopez v. Shulsen, 26 Utah Adv. Rep. 22 (1986) this Court recently reiterated the familiar principle that an appellant may not present issues in a collateral attack that "were known or should have been known during the time his direct appeal was pending... ." In the present case, the appellant attempted to present issues that became known during the pendency of his direct appeal. An injustice and loss of judicial efficiency would result if the appellant in this case was forced to raise issues via a collateral attack which his attorney sought permission to raise on direct appeal.

Recently, in Evitts v. Lucey, 469 U.S. ____, 83 L.Ed. 2d 821 (1985), the United States Supreme Court stated that effective assistance of counsel on a first appeal of right is guaranteed by the due process clause of Fourteenth Amendment to the U.S. Constitution. However, because counsel's attempt to incorporate recent case law under Rule 24(j) was apparently not considered and because counsel was not allowed to file a supplemental brief under Rule 24(c), appellant's right in this case to effective assistance of appellate counsel was essentially denied.

If counsel had been allowed to file a supplemental brief, the issue raised would have required reversal of the conviction. In this case, Jury Instruction #18 (Addendum B) stated, in part:

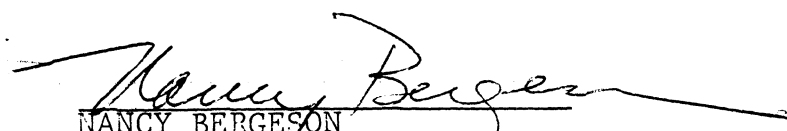
Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property.

This is precisely the language addressed in similarly contested jury instructions by this Court in Chambers and Pacheco. In both cases, this Court found the language of such an instruction to be unconstitutional because such language constituted a mandatory rebuttable presumption which improperly shifted the burden of proving innocence to the defendant. State v. Chambers, 709 P.2d at 325-6 (Utah 1985) and State v. Pacheco, 20 Utah Adv. Rep. at 19 (Utah 1985). Since counsel preserved the record in this case by specifically objecting to the instruction in question (R.233-234), Chambers and Pacheco would be dispositive of this case and would require this Court to reverse the appellant's conviction.

CONCLUSION

Because this Court overlooked the appellant's attempt to incorporate an issue which became known only during the pendency of his appeal and because recent case law in this State would be dispositive of this case, the appellant, Lawrence Pitts, respectfully petitions this Court to reconsider the previous decision in this case and either re-docket the case for new briefing or reverse his conviction and remand the case for a new trial.

RESPECTFULLY SUBMITTED this 11 day of February, 1986.


NANCY BERGESON
Attorney for Petitioner

I hereby certify that I delivered _____ copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, this 11 day of February, 1986.

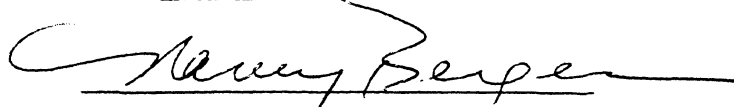
CERTIFICATION

I, NANCY BERGESON, do hereby certify the following:

(1) I am the attorney for Appellant/Petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

RESPECTFULLY SUBMITTED this 11 day of February, 1986.



ADDENDUM A

SALT LAKE LEGAL DEFENDER ASSOCIATION

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JOSEPH A. GETER

November 5, 1985

Geoffrey J. Butler, Clerk
Utah Supreme Court.
332 State Capitol Building
Salt Lake City, Utah 84114

Re: State v. Lawrence Pitts
Case No. 20290

Dear Mr. Butler:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, Appellant requests permission to incorporate two cases recently decided by this Court into his brief submitted February 15, 1985.

Specifically, Appellant wishes to rely on the cases of State v. Chambers, No. 19152, (filed Oct. 21, 1985), and State v. Pacheco, No. 20047 (filed Oct. 21, 1985), and brief the issue of the constitutionality of an instruction given by the trial court regarding possession of property recently stolen. The instruction was patterned after Utah Code Ann. §76-6-401(1) (1953 as amended), requiring defendant to give a reasonable explanation for his possession, and was identical to the instructions given in Chambers and Pacheco, supra.

Chambers and Pacheco both held the instruction unconstitutionally shifted the burden of persuasion to the defendant to prove innocence.

-continued-

G. Butler
Re: Pitts
Nov. 5, 1985
Page Two

Appellant requests permission to submit this issue in a Supplemental Brief.

Sincerely,



NANCY BERGESON
Attorney for Appellant

NB/al

cc: Attorney General's Office
(4 copies)

ADDENDUM B

INSTRUCTION NO. 18

Utah Law provides that:

"Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.

You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.