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State v. Woolley et al : Brief of Respondent

Utah Supreme Court

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A. Pratt Kesler; Attorneys for Appellant;

Clifford L. Ashton; Howard L. Edwards; Attorney for Respondents;

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In the

Supreme Court of the State of Utah

FILED

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STATE OF UTAH, by and through
its ROAD COMMISSION,
Plaintiff and Appellant,

—vs.—

Clerk, Supreme Court, Utah
Case No. 9966

FRANK A. WOOLLEY, et al.,
Defendants and Respondents.

BRIEF OF RESPONDENT

Appeal From a Judgment and Order of the Third
District Court, in and for Summit County, Utah,
HONORABLE A. H. ELLETT, *Judge*

VAN COTT, BAGLEY,
CORNWALL & McCARTHY
CLIFFORD L. ASHTON
HOWARD L. EDWARDS

65 South Main Street
Salt Lake City, Utah

Attorneys for Respondents

A. PRATT KESLER
Attorney General

NORMAN S. JOHNSON
Assistant Attorney General

ROBERT S. CAMPBELL, JR.
Special Assistant Attorney General

Attorneys for Appellant

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In the Supreme Court of the State of Utah

STATE OF UTAH, by and through
its ROAD COMMISSION,
Plaintiff and Appellant,

—vs.—

FRANK A. WOOLLEY, et al.,
Defendants and Respondents.

} Case No. 9966

BRIEF OF RESPONDENT

NATURE OF THE CASE

This suit is an eminent domain proceeding initiated by the appellant to condemn lands of the respondents to be used in connection with the construction and operation of Highway Project I-80-4(8)-190.

In this brief appellants will be referred to as the "State" and respondents will be referred to as the "Landowner."

DISPOSITION OF THE CASE BY LOWER COURT

The issue of the necessity for the taking was heard by the Third District Court before the Honorable A. H. Ellett, sitting without a jury, at Coalville, Summit County, on April 25, 1963. The Court entered judgment on that issue against the Landowner and in favor of the State and no appeal has been taken therefrom.

The remaining issue of compensation to the Landowner was tried the same date before Judge Ellett, sitting with a jury. The Court entered judgment against the State and in favor of the Landowner in the sum of \$20,000.00. Subsequently, the State's motion for a remittitur of the verdict and, in the alternative, a new trial was denied by the trial court.

RELIEF SOUGHT ON APPEAL

By this appeal the State seeks a reversal of the judgment of the District Court as to the jury verdict of \$20,000.00 and remanding the case for a new trial.

STATEMENT OF FACTS

The Landowner generally agrees with the statement of facts set forth in the State's brief. The statement is not entirely accurate in the assertion that there are no improvements (Brief-3). The lands designated by the State's witness as meadowland have been fenced (Tr.-74) and there is a developed source of water (Tr.-73).

Also, the statement in the brief at page 3 that "the subject property does not, and did not at the time of

taking, continue to the State line" is an inaccurate statement. The land taken does continue to and is adjacent to the Wyoming-Utah State line (Tr.-109, State's Exhibit No. 1).

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN EXCLUDING SALES PRICES WHICH WERE OFFERED BY THE STATE'S WITNESS FRED FROERER.

This Court has laid down the rule that evidence of other sales may be used in support of an opinion of value in an eminent domain proceeding, subject to the condition that it be shown that there is sufficient similarity between the properties, *State v. Peterson*, 12 Utah 2d 317, 366 P.2d 76, 1961; *State v. Peek*, 1 Utah 2d 263, 265 P.2d 630, 1953.

If sales prices of other lands relate to sales that are not reasonably comparable, evidence relating to those sales is not admissible. This Court has recognized that no two parcels of real estate are exactly alike. Nevertheless, evidence of other sales is admissible if it should appear that the lands are generally similar, particularly as to factors having a bearing on value, such as location, actual or potential uses, terms of payment, and that the other sales were close enough in time that circumstances had not changed as to have that effect. In the absence of reasonable comparability, testimony as to other sales is clearly inadmissible, *State v. Peterson, supra*.

The witness for the State testified briefly as to only one sale. The extent of his testimony was that:

“A. I found on investigation at the Uinta County, Wyoming records, if I can consult my notes, the sale of 180 acres of land adjoining the City of Evanston on the west, which would be between the City of Evanston and the Wyoming-Utah border, that a deed was recorded in Book 244. Page 136, from Florence B. Elsinore and others.” (Tr.-71)

No foundation whatever was given to show that the sale was the sale of comparable lands. No testimony was given as to the use of the land, the terrain, whether or not the sale referred to was voluntary, whether the terms of payment were not so extended as to make a substantial difference in the price, or any other factor that would indicate even the slightest degree of comparability between the lands involved in said sale and the lands being taken in this case.

Moreover, the Court did not exclude any testimony relating to comparable sales except in this one case where the price, alone, was excluded. The Court ruled that the price only should be left out and that counsel could go on with his examination (Tr.-71, 72). No other testimony was adduced as to any sales whatever.

The witness did say that he had talked to another appraiser in Wyoming in regard to the location of a reservoir site at Randolph, Utah, and that lands there were considered to be comparable to the lands being taken in this case (Tr.-72). No evidence whatever was adduced to indicate that the lands were comparable. The

bare statement of a witness, without any other foundation, that lands are comparable does not make them such.

The absence of any showing whatever of physical and environmental characteristics of lands involved in other sales that would indicate comparability or any showing that the terms of the sales were comparable would make any evidence of sales prices inadmissible and accordingly the trial court did not err in excluding sales prices (4 *Nichols on Eminent Domain*, 3rd Ed., 12.311 [c]).

Moreover, the opinion value stated by the State's witness Mr. Froerer, was not materially contested by the Landowner insofar as it related to approximately 76 of the 77 acres involved in the taking.

The Landowner testified that a portion of the property being taken, described as having a 200-foot frontage and 145-foot depth at or near the State line, had value for commercial purposes. The Landowner's testimony as to the remaining 76 or so acres was as follows:

"Q. Now will you come back with me, please, do you have any opinion as to the reasonable market value of this particular agricultural ground as of February 18 of this year?

"A. Well, I have an opinion but I would leave that. I think I am not qualified as far as an expert in the price of that, so I would leave that to the Court's decision as far as the experts are concerned." (Tr.-22)

The Landowner did testify later in the trial that he felt that the value of the land other than the commer-

cial site near the State line is \$10,000.00 (Tr.-53). This is not materially greater than the State's appraisal. There was no other testimony by the Landowner or witnesses on his behalf that would contradict that figure.

Mr. Froerer testified that the lands next to the State line were worth \$65.00 an acre (Tr.-74). His testimony as to the remaining 76 acres was not materially contested in any way by the Landowner. The support of the State's testimony by testimony of the Landowner would negate any prejudicial effect of the Court's exclusion, *State v. Peterson, supra*.

The exclusion of a sales price by the Court was not error and did not prejudice the State.

POINT II.

THE TRIAL COURT DID NOT ALLOW THE LANDOWNER TO BRING BEFORE THE JURY ANY FACTS RELATING TO THE USE OF FEDERAL FUNDS THAT WOULD CONSTITUTE ERROR.

The State alleges that the trial court erred prejudicially in allowing the respondent to bring before the jury the fact that Federal funds were involved in the condemnation. The testimony about which the State complains is the cross-examination of the State's witness Mr. Adams concerning his employment, at page 96 of the transcript as follows:

“Q. Mr. Adams in working for the Road Commission you work on these interstate federal

highways, I suppose on the appraisals. Is that right?

A. I work all over the State, whether it is federal, secondary or truck.

Q. This is one of the federal interstate highways?

A. That's correct.

Q. And is part of your salary paid by Federal funds?

Mr. Johnson: Objection, Your Honor.

A. The check—

The Court: Just a minute. The object is overruled. Go ahead, if you stand up.

* * *

A. My check comes from the State. I don't know what percentage—

Q. But you know as a matter of fact it is partially paid by federal funds?

A. I guess if I was on the federal job I would be.

Q. And these appraisals are on federal jobs?

A. This is federal highway." (Tr.-96, 97)

The State cites as authority for the allegation of error *Jensen v. South Carolina State Highway Department*, 236 S.C. 424, 114 S.E. 2d 591, 1960. In that case, the Supreme Court of that State stated that it would be improper to admit the sources of funds for the payment of the amount of the verdict. There was no such testimony in this case.

The State also cites as authority *State v. Salt Lake City Board of Education*, 13 Utah 2d 56, 368 P. 2d 468, 1962. In that case this Court did not hold that the public source of funds in a condemnation proceeding is not admissible as evidence. The court in fact held at page 59 that:

“While the fact that the Federal government is participating in the cost because the road is for the benefit of the entire nation, has no bearing on determination of the legal issues involved and would not be admissible in evidence, it does point up dramatically how incongruous and inequitable it would be to impose the entire cost of the right of way upon this individual school board.”

The court in that case was addressing itself to the question of whether one public agency was required to pay compensation for lands taken from another public agency and not the question of whether bringing before the jury the fact that Federal funds are involved is prejudicial error.

The testimony adduced by the Landowner on cross-examination did not state or imply that the verdict in that case would be paid by Federal funds. There was testimony that the highway project is an interstate highway project. This is certainly not error under the cases relied upon by the State. Counsel for the State himself stated that this was an interstate highway (Tr.-45), thus implying that it was a Federal project. Moreover, on the motion of the State the jury visited the site of the land being taken and were able to view first hand that the project would be a widening of an existing U. S. Federal-aid Highway.

The interrogation of an expert witness as to his employment and the source of his salary is certainly proper cross-examination. It goes to the credibility of the witness. The jury is entitled to this information to determine if there is bias, (III *Wigmore on Evidence*, Third Edition, Sec. 949, p. 501, Sec. 966, p. 524, *et seq.*).

POINT III.

THE COURT DID NOT ERR IN ALLOWING THE LANDOWNER TO BRING BEFORE THE JURY EVIDENCE OF NEGOTIATIONS WITH VARIOUS OIL COMPANIES.

The position of the defendants in this case is that a small parcel of the land being taken adjacent to the state line possessed distinct and special value for commercial purposes by reason of its proximity to the state line. The State's allegation of error in bringing before the jury negotiations with various oil companies is indicative of the State's position in refusing to recognize any special value of the lands by reason of the state line location.

The Landowner, Mr. Woolley, testified that the land close to the state line was specially valuable for commercial purposes and particularly for service station purposes (Tr.-14, 17, 18). He testified that the state line location is particularly valuable because of a difference of price of gasoline between Wyoming and Utah (Tr.-18). He also testified as to his negotiations with oil companies, thus showing a possible scheme of development for the purpose for which the land is most valuable (Tr.-14, 15, 16). Mr. Tozer, property representative of

the Standard Oil Company of California, testified on behalf of the Landowner that the particular land was specially valuable for service station purposes (Tr.-65) and that one reason for the special value was because the location was similar to other locations at state lines (Tr.-66). Mr. Aaron, a garage operator, service station operator and real estate operator with special training in the real estate field, testified that the highest and best use of the property being taken is commercial and that the property would be valuable for service station property (Tr.-58, 59) and that the state line location has certain advantages such as attraction to tourists and to people who buy gasoline and like products (Tr.-60).

None of this testimony was error. In determining the market value of a piece of real property for the puposes of the taking by eminent domain it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration. The possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied must be considered. Its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test, 4 *Nichols on Eminent Domain*, Third Edition, 12.314. All factors bearing on the value of the land that any prudent purchaser would take into account should be given consideration, including any potential development in the area reasonably to be expected, *Weber Basin Water Conservancy District v. Ward*, 10 Utah 2d 29, 349 P. 2d 862, 1960.

Proof of actual, reasonable or intrinsic value of the property may be shown by the value of its uses, its particular fitness for such uses and its adaptability for any other uses or purposes and the reasonable value thereof. A witness may give his opinion of the value of such property based on such uses and the value thereof when it has been shown that he has some knowledge of such uses beyond that of the jurors. Thus evidence of the market value of the property for the best and most profitable use to which it may be devoted in the reasonably near future is admissible, 5 *Nichols on Eminent Domain*, Third Edition, 18.11 (2).

As bearing on the issues of the highest and best use for a potential use the owner of the land may offer a plan showing a possible scheme of development for the purpose for which the land is most available, provided it appears that the likelihood of demand for the property for that purpose is such as to affect market value, 5 *Nichols on Eminent Domain*, Third Edition, 18.11 (2). The plan of development testified to by the Landowner was amply supported by testimony of experts in the field.

Moreover, the Landowner is qualified to express his opinion as to value and as to the possibilities of the land for use. It is generally held that the Landowner has a reasonably good idea of what the land is worth. The weight of his testimony is for the jury, 5 *Nichols on Eminent Domain*, 18.4 (3).

The testimony brought before the jury relating to negotiations with oil companies was clearly admissible

in support of the testimony of the highest and best use of the land, the Landowner's plan of development and of the market value. No testimony whatever was adduced as to the possible income from a commercial venture on the land or any other matter that would be considered a speculative enterprise or a speculative future use of the property.

POINT IV.

THE TESTIMONY IN SUPPORT OF THE LANDOWNER'S CASE MORE THAN ADE- QUATELY JUSTIFIED A VERDICT OF TWENTY THOUSAND DOLLARS.

The State's allegation that witnesses of the Landowner were unqualified is completely without merit.

The State attacks the qualifications of the witness, John Aaron, for the reason that he does not live in Utah and had done no selling in Utah, and concludes that Mr. Aaron was thus not acquainted with market conditions in Utah. Mr. Aaron had resided in the area of Evanston, Wyoming for the last 23 years (Tr.-53) and has been in the real estate and service station business for 18 years (Tr.-53) in the same area in which he has lived. His business operations extend into Utah (Tr.-54). Evanston, Wyoming, is only five miles from the location of the land which is being taken. Contrast this to the fact that the State's witnesses live and work in Salt Lake, Layton and Ogden, Utah, which are 90 to 100 miles from the land being taken. Mr. Aaron testified adequately as to his familiarity with land values for service station property and as to his special training and qualifications in real estate matters (Tr.-54, 55). The assertion of the State

that Mr. Aaron was not acquainted with market conditions in Utah and as a result is not an expert as to Utah market value has no basis in law or fact.

The State's attack on the qualifications and testimony of Mr. Tozer is centered around the fact that his initial appraisal was made some years ago, namely, 1956 and 1957 (Tr.-64). However, that particular allegation has no merit for the reason that Mr. Tozer has further examined and seen the property and has since that date studied the operations of the existing service station directly across the state line (Tr.-65). Moreover, the State certainly would not suggest that property values have decreased since 1956 and 1957 in the area of the land that is being taken.

All three of the witnesses testifying on behalf of the Landowner testified as to the value of the property for a special use. Such value may be testified to by persons familiar with the use to which the property is adapted. Even if the Court should decide that the witnesses are not familiar with land values generally, if a witness by reason of his skill, learning or technical training understands the adaptability of the lands in question for a particular purpose and the demand for land for such purpose, he may state the market value of the land. This is true even though he may be entirely unacquainted with the other elements which would be considered by different buyers competing for the same property, 5 *Nichols on Eminent Domain*, Third Edition, 18.41 (3).

The State even attacks the theory advanced by the defendants as spurious for the reason that there exists

many miles of highway frontage from which a prospective buyer could choose. Again, the State completely overlooks the undisputed testimony of three witnesses that the land has special value for commercial purposes by reason of its proximity to the state line. There is nothing incredible, impossible or improbable about the testimony of the Landowner's witness. On the other hand, the award of the jury was reasonable or even conservative in view of the expert testimony of the value of the property.

CONCLUSION

The Trial Court did not commit error and there was no improbability in the Landowner's testimony and accordingly the jury verdict and judgment of the Trial Court should be affirmed.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY
CLIFFORD L. ASHTON
HOWARD L. EDWARDS

65 South Main St.
Salt Lake City, Utah

Attorneys for Respondent