

1984

The State of Utah v. Robert Steven Smith : Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
 :
 Plaintiff-Respondent, :
 :
 -v- : Case No. 19053
 :
 ROBERT STEVEN SMITH, :
 :
 Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF ATTEMPTED ROBBERY, A THIRD DEGREE FELONY, AND ATTEMPTED BURGLARY, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-4-101, 76-6-301, AND 76-6-202 (1953 AS AMENDED), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID B. DEE PRESIDING.

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AUG 3 1954

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-v- : Case No. 19053
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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19053
ROBERT STEVEN SMITH, :
Defendant-Appellant. :

STATEMENT OF THE NATURE OF THE CASE

Appellant, Robert Steven Smith, was charged by information with Attempted Robbery, a third degree felony, and Attempted Burglary, a third degree felony, in violation of Utah Code Ann. §§ 76-4-101, 76-6-301, and 76-6-202 (1953 as amended).

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of Attempted Robbery, a third degree felony, and Attempted Burglary, a third degree felony, in a jury trial held January 13, 17, and 19, 1983, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable David B. Dee presiding. On February 3, 1983, appellant was sentenced to not more than five years at the Utah State Prison to be served concurrently with the terms he was already serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgement and sentence of the trial court.

STATEMENT OF FACTS

Appellant, Robert Steven Smith, was incarcerated at the Utah State Prison and was residing in a half-way house on work release status (R. 142). On October 15, 1981 appellant was arrested by South Salt Lake City police officers for violation of his parole and suspicion of being involved in a criminal activity (R. 142, 1173-1174). Co-defendant Wayne Sterling Pearson and two juveniles, Brian Scott Moss and Gilbert Anthony Sisneros, were also taken into custody on that date. Following their arrest Mr. Moss and Mr. Sisneros gave police statements which, along with evidence produced from an investigatory search of appellant's automobile (R. 1176-1181), were sufficient to establish appellant's involvement in a scheme to burglarize and rob the home of Myra E. Kuhre (R. 140, 598-607, 984, 996-998).

On October 15, 1981, as a result of appellant's association with fellow half-way house resident Pearson in an area not related to appellant's work release, as well as his suspected criminal activity, appellant was returned to the Utah State Prison. Appellant's work release status was revoked and his January 1982 parole release date was rescinded by the Utah Board of Pardons on the basis of the above parole violations (R. 142-143).

From the October 15, 1981 arrest for parole violation until March or April 1982, police conducted a follow-up investigation to obtain evidence to corroborate the

witnesses' statements concerning the robbery scheme (R. 140). police officers investigating the case considered this case related to other criminal activity in the area and realized that a discrete investigation was essential to avoid endangering successful prosecution of other potential defendants (R. 141). For this reason the investigation continued beyond April 1982 and charges for attempted robbery and burglary were not filed against appellant until September 7, 1982.

At trial, appellant produced no evidence that the delay in filing the information for attempted robbery and burglary resulted in any prejudice to his defense, nor did he make any showing that the delay was intentionally caused by the prosecutor to gain a tactical advantage over appellant (R. 143).

ARGUMENT

POINT I

THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL IS INAPPLICABLE TO THE ELEVEN MONTH DELAY BETWEEN APPELLANT'S ARREST FOR PAROLE VIOLATION AND THE DATE FORMAL CHARGES FOR ATTEMPTED ROBBERY AND ATTEMPTED BURGLARY WERE MADE AGAINST HIM.

- A. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL MAY NOT BE INVOKED UNTIL A PERSON IS FORMALLY "ACCUSED" IN THE COURSE OF CRIMINAL PROSECUTION.

Appellant claims that the delay of approximately eleven months between appellant's arrest for parole violation

and the date formal charges for attempted robbery and burglary were filed against him violated his Sixth Amendment right to a speedy trial. This contention is without merit. The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article I, Section 12 of the Utah Constitution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." Article I, Section 12 provides that "[i]n criminal prosecution, the accused shall have the right to . . . a speedy trial by an impartial jury of the County or District in which the offense is alleged to have been committed. . . ." The Sixth Amendment and Article I, Section 12 guarantees of a speedy trial afford important protections against undue and oppressive incarceration prior to trial, minimize anxiety and concern which accompany public accusation, and limit the possibility of impaired defense due to long delay between accusation and trial. See United States v. Ewell, 383 U.S. 116, 120 (1966).

The right to a speedy trial, however, may not be invoked against every delay between accusation and trial. The Ewell court, after enumerating the reasons for speedy trial, continued by qualifying the right as one relative to the circumstances of each particular case. The court stated that some delays are necessary to ensure adequate prosecution, and a defendant's right to a speedy trial "does not preclude the right of public justice." United States v. Ewell, 383 U.S.

at 120.

The constitutional right to speedy trial does not attach until a person has been "accused" of criminal activity. While appellant in the case at bar was arrested on October 15, 1981 for parole violation, he was not formally "accused" of attempted robbery and burglary until September 7, 1982. Both the constitutional language as well as the language in the Ewell opinion refer to the speedy trial right of the "accused." In United States v. Marion, 404 U.S. 307 (1971) the Supreme Court expressly adopted this limitation, stating that "the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused'. . . . On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." United States v. Marion, 404 U.S. at 313. The Marion court also expounded on the meaning of "accused." The court stated that the speedy trial provisions of the Sixth Amendment are engaged upon:

either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge. . . . Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation.

United States v. Marion, 404 U.S. at 320-321.

Utah cases have also consistently held that no speedy trial right exists until a prosecution has been initiated by a formal indictment or information. See generally State v. Renzo, 21 Utah 2d 205, 443 P.2d 392 (1968); State v. Belcher, 25 Utah 2d 37, 475 P.2d 60 (1970). In other words, until a defendant is formally accused by indictment, information, or arrest in the course of criminal prosecution, the Speedy Trial Clause is irrelevant as to that crime. Appellant's October 15, 1982 arrest was related to his parole violation, and was not in the course of criminal prosecution for attempted robbery and burglary.

Many of the cases cited in appellant's brief are distinguishable on this point. In both Klopfert v. North Carolina, 386 U.S. 213 (1967) and People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955), the delay complained of occurred between the indictment and trial. Thus, the defendant in each case stood accused of the crime and was entitled to the Sixth Amendment speedy trial right. In State v. Lozano, 23 Utah 2d 312, 462 P.2d 710 (1969), Barker v. Wingo, 407 U.S. 514 (1972) and Dillingham v. United States, 423 U.S. 64 (1975), also relied upon by appellant, the defendants had been arrested pursuant to criminal prosecution, and thus stood accused of criminal conduct.

B. APPELLANT WAS NOT "ACCUSED" OF THE PRESENT CHARGES UNTIL SEPTEMBER 7, 1982; THUS, THE RIGHT TO SPEEDY TRIAL DID NOT ATTACH UNTIL THAT DATE.

In the present case, the Speedy Trial Clause is irrelevant as to appellant's confinement for parole violation prior to the information which was filed September 7, 1982 for attempted robbery and burglary (R. 143). Appellant was not formally "accused" of the present charges (attempted robbery and attempted burglary) neither by indictment, nor information, nor arrest, nor even by confinement until September 7, 1982. Rather, appellant's arrest on October 15, 1981 and subsequent return to the Utah State Prison was a result of appellant's violation of his parole status and not related to the September 7, 1982 charges of attempted robbery and burglary. Prior to his arrest, appellant was incarcerated at the Utah State Prison pursuant to an unrelated conviction and was living at a half-way house on work release status (R. 142). On October 15, 1981, South Salt Lake City police officers arrested appellant based on his being at a place not related to his work release, his unauthorized association with another half-way house resident, and his being suspected of criminal activity -- all violations of appellant's conditions of parole (R. 142-143).

The Utah Supreme Court has upheld the Utah Board of Pardons' authority to assign conditions of parole to parolees and also has allowed police officers to arrest and reimprison a person based on violation of his conditions of parole. See generally State v. Kent, Utah, 665 P.2d 1317 (1983) (The Court authorized arrest based on defendant's violation of his parole

by association with known felons); State v. Bullock, Utah, 589 P.2d 777 (1979) (Parolee has limited liberty which may be cancelled); Vriege v. Turner, 18 Utah 2d 233, 419 P.2d 769 (1966) (Upheld the Board of Pardons' right to attach conditions of parole and authorities' right to arrest and reimprison a person for violating such conditions).

This Court, in Ward v. Smith, Utah, 573 P.2d 781 (1978), discussed in detail the role of the Board of Pardons with respect to granting parole:

The Board of Pardons is created by the constitution and its exclusive powers are implemented by statute. It has plenary authority to conditionally release prisoners on parole. Parole is a conditional release, the condition being that the prisoner make good or be returned to serve his unexpired time (U.C.A. 77-62-1(b)(1953)). It is a privilege, an act of grace as distinguished from a right. Parole is not absolute liberty as all law-abiding citizens enjoy, but only conditional liberty dependant upon compliance with parole restrictions. The parolee remains in legal custody until such time as his sentence is terminated.

Parole revocation is an administrative proceeding and not a criminal prosecution. [see Morrissey v. Brewer, 408 U.S. 471 (1972)]. It stems from a clear violation of the rules and regulations imposed as a condition of parole. . . .

Ward v. Smith, 573 P.2d at 782 (emphasis added). See also Utah Code Ann. § 77-62-17 (1953 as amended), which provides that parole revocation can occur without any violation of the criminal law.

In the present case, during the entire period from the October 15, 1981 arrest for parole violation to the September 7, 1982 charges for attempted robbery and burglary, appellant was incarcerated pursuant to a lawful commitment on a previous charge. This confinement did not commence criminal prosecution and thereby activate the speedy trial guarantee, but rather appellant's arrest was a result of his parole revocation -- an administrative proceeding which would have resulted regardless of appellant's explanation for being in an unauthorized area in the company of another half-way house resident. Such an administrative proceeding is insufficient to invoke the Sixth Amendment right to a speedy trial.

C. THE PRE-ACCUSATION DELAY WAS FOR INVESTIGATIVE REASONS AND DID NOT RESULT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHT.

In determining whether an appellant's speedy trial right has been violated, the court will consider not only the length of time from arrest to indictment and indictment to trial, but also any delay which occurs prior to the arrest. And while no Sixth Amendment right to a speedy trial arises until formal charges are pending, any unnecessary "delay prior to arrest or indictment may give rise to a due process claim under the Fifth Amendment." United States v. MacDonald, 456 U.S. 1, 7 (1982) (citation omitted). See also United States v. Lovasco, 431 U.S. 783, 788-789 (1977). The Due Process Clause, however, does not allow the courts complete discretion

to decide when an indictment should be sought or when an arrest should be made. The court's judgment in this regard should not be substituted for that of the attorney. According to the United States Supreme Court:

It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. * * *

Penalizing prosecutors who defer actions for [investigative delay] would subordinate the goal of "orderly expedition" to that of "mere speed," Smith v. United States, 360 U.S. 1, 10 (1959). This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

United States v. Lovasco, 431 U.S. at 790-791, 795-796.

The Tenth Circuit Court of Appeals has construed United States v. Marion, 404 U.S. 307 (1971) as establishing a two-pronged due process test against which to measure pre-accusation delay. In order for a defendant to successfully maintain a due process claim he must show: (1) "actual prejudice resulting from the preindictment delay," and (2) "that the delay was purposefully designed to gain tactical advantage or to harass the defendants." United

States v. Revada, 574 F.2d 1047, 1048 (10th Cir. 1978) quoting United States v. Beitscher, 467 F.2d 269, 272 (10th Cir. 1972).

The United States Supreme Court in Lovasco confirmed the Tenth Circuit's interpretation by stating that "the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." United States v. Lovasco, 431 U.S. at 790. Likewise, this Court also enunciated the same due process test in State v. Archuletta, Utah, 577 P.2d 547 (1978). In Archuletta this Court recognized the accused's right to a prompt trial, but also stressed that "unless there is some intentional delay of an oppressive character, which results in prejudice to the defendant, the processes of justice should not be wholly defeated [by the delay]." State v. Archuletta, 577 P.2d at 548-549.

Thus in order to sustain a due process claim, appellant must show that preindictment delay caused substantial prejudice to his right to a fair trial and that the delay was an intentional device by the prosecutor to gain some tactical advantage over the accused. The trial court concluded that appellant had met neither requirement (R. 143).

Appellant argues that he was prejudiced due to his incarceration. However, as already discussed, appellant's return to prison was based upon violations of the conditions for half-way house status. Appellant has made no showing of an instance, nor is there any, where the delay prior to filing

charges caused harm to appellant or his case. Parole is not a matter of right, but is a discretionary function of the parole board. Appellant has made absolutely no showing that the delay in filing charges caused the delay of the gratuitous parole date. Nor is a claim of prejudice based upon passage of time sufficient. In United States v. Lovasco, 431 U.S. 783, 796 (1977) the court held that investigative delay would not give rise to a due process claim even if the defense might have been somewhat prejudiced. The defendant in Lovasco was prejudiced by the death of two witnesses, yet no due process action would lie. In the case at bar, appellant claims that the State's witnesses were unable to consistently remember the events of which they testified. The inconsistencies, however, were not due to memory failure, but rather to fabricated stories told by the two young men (R. 653-654, 664, 669-671, 1082-1085). Nevertheless, even if the inconsistencies were due to memory failure, the lapse of time and its impact on memories will always be present in any delay. See United States v. Marion, 404 U.S. 307, 321-322 (1971). Where there is no intention of delay for that purpose, the mere passage of time is insufficient to establish substantial prejudice.

Appellant has also failed to show an intentional delay by the State to gain a tactical advantage. Appellant implicitly makes a due process claim founded upon delay between the October 15, 1981 arrest for parole violation and

the September 7, 1982 filing of the information for attempted robbery and burglary. Appellant assumes that the information could have been filed on the earlier date, but has made no showing to the effect but for his conjecture in hindsight. In fact, the delay was necessary to allow police investigators adequate time to uncover evidence which would support the charges of attempted robbery and attempted burglary. The trial court found that (1) the investigation of this crime was part of a larger investigation involving other potential defendants; (2) early disclosure of the present charge might have jeopardized the larger investigation; and (3) the crime appellant was involved in was still under investigation (R. 140-141). As previously discussed, and supported by United States v. Lovasco, 431 U.S. at 790-791, 795-796, investigative delays alone are not violative of due process considerations, and such delays are not to be regarded as an attempt to gain a tactical edge over the accused.

D. THE TIME PERIOD OF DELAY WAS
SUBSTANTIALLY LESS THAN WHAT IS PERMITTED
BY THE STATUTE OF LIMITATIONS.

This Court should also note that the period of delay before commencing prosecution of the appellant was substantially less than that permitted by the statute of limitations, which for Aggravated Robbery and Burglary is four years. Utah Code Ann. § 76-1-302 (1953 as amended).

CONCLUSION

Appellant was not denied his Sixth Amendment right to a speedy trial. This constitutional right does not attach until a person has been "accused" of criminal activity. A person becomes "accused" either by the filing of an information or indictment or by arrest in connection with a criminal prosecution. Appellant, however, was not "accused" of the present charge until shortly before his trial. Although appellant was arrested on October 15, 1981, eleven months prior to his trial on charges of attempted robbery and burglary, that October arrest was an administrative proceeding pursuant to appellant's violation of his parole conditions as it related to a previous and unrelated conviction. Appellant's pre-trial incarceration at the Utah State Prison was not in connection with the charges of the crimes which pertain to this appeal.

Appellant had been convicted of previous charges and was serving time at a half-way house on work release status from the Utah State Prison. On October 15, 1981 appellant violated the conditions of his parole and was consequently returned to the Prison. Violation of parole by appellant was sufficient basis upon which to revoke his parole and return him to the Utah State Prison to serve the remainder of his previous sentence.

Moreover, appellant is unable to show that the delay in filing charges against him deprived appellant of his right

to due process of law. The delay was neither prejudicial to appellant's defense nor was it an intentional delay by the State to gain a tactical advantage. Rather, the delay was essential to allow adequate investigation of this case as well as inquiry into possible related criminal cases. Based upon the foregoing, the judgment and sentence of the trial court should be affirmed.

RESPECTFULLY submitted this 8th day of August,

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 Thomas J. McCormick, attorney for appellant, 333 South Second East, Salt Lake City, Utah 84111, this 8th day of August, 1984.

David B. Thompson for