

1992

Logan City v. Lowell D. Carlsen : Brief of Appellee

Utah Court of Appeals

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Lowell D. Carlsen; pro se.

Scott L. Wyatt; attorney for appellee.

Recommended Citation

Brief of Appellee, *Logan City v. Lowell D. Carlsen*, No. 920739 (Utah Court of Appeals, 1992).
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IN THE UTAH COURT OF APPEALS

LOGAN CITY,

Plaintiff and Appellee,

vs.

LOWELL D. CARLSEN,

Defendant and Appellant.

Case No. 920739-CA

Case Type: Appeal

Priority No. 2

BRIEF OF APPELLEE

AN APPEAL TAKEN FROM THE
FIRST CIRCUIT COURT OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF CACHE, LOGAN CITY DEPARTMENT
THE HONORABLE K. ROGER BEAN PRESIDING

UTAH COURT OF APPEALS
BRIEF

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FILED
Utah Court of Appeals

AUG 12 1993


Mary T. Noonan
Clerk of the Court

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated, Section 78-2a-3(2)(d) (1953 as amended.)

STATEMENT OF ISSUES PRESENTED

1. Whether Logan Municipal Code Section 9.24.040 is in conflict with general state law, or is repugnant to state law, and based thereon whether Appellant's conviction of violating the same should be overturned.

2. Whether the trial court's treatment of Appellant's motion to dismiss and Appellee's motion to amend the information prejudiced appellant or violated his substantial rights.

3. Whether Appellant is precluded from challenging the

constitutionality of Logan Municipal Code section 9.24.040. And if Appellant is not so precluded is the ordinance unconstitutionally vague and therefore void.

4. Whether there was sufficient evidence at trial to sustain the jury verdict.

5. Whether the trial court lacked jurisdiction to impose sentence because of a delay in sentencing that went well beyond 30 days following the trial.

STATEMENT OF THE CASE

Appellant was charged with furnishing tobacco to a minor under the age of 19 years old, in violation of Logan Municipal Code section 9.24.040.

A jury trial was held in this matter on the 16th day of January, 1992 in the First Circuit Court of the State of Utah, in and for the County of Cache, Logan City Department, the Honorable Roger Bean presiding.

The jury returned a verdict of guilty. The court entered judgment on the 6th day of October, 1992.

Appellant is appealing from that verdict and judgment.

STATEMENT OF THE FACTS

The transcript lists the testimony of Appellant and 2 of the Prosecutions 4 witnesses, therefore, critical facts are omitted in the transcript, however a brief list of the critical, uncontroverted facts are as follows:

1. Jerren Barson, a 16 year-old boy, acting under the direction of the State Health Department and the Logan City

Police department attempted to purchase cigarettes from 20 stores in Logan City during a routine compliance check. (Transcript p.71, 75.)

2. At Appellant's business Appellant, Lowell Carlsen, sold cigarettes to him. (Transcript p.73, 98, 101.)

3. None of the other 19 business sold cigarettes to Jerren Barson despite his requests for the same. (Transcript p.75.)

4. With respect to the interaction Jerren Barson had with Lowell Carlsen, Jerren testified as follows: "I went up there and asked for a pack of Camel Lights and he [Appellant] goes, 'are you 19?' And I didn't say nothing. Then he just gave them to me with a pack of matches, and then I went back to the car."
(Transcript p.73.)

5. With respect to Jerren's testimony referred to above in paragraph no.4, Lowell Carlsen's only dispute was that he testified Jerren lied about his age indicating he was 19.
(Transcript p.95.)

SUMMARY OF ARGUMENT

Appellant has not met his burden on any of the points he raises to justify receiving any favorable treatment from this court.

ARGUMENT

I

LOGAN MUNICIPAL CODE SECTION 9.24.040 IS NOT IN CONFLICT WITH GENERAL STATE LAW, IS NOT REPUGNANT TO STATE LAW, AND THEREFORE APPELLANT'S CONVICTION OF VIOLATING THE SAME SHOULD BE UPHELD.

Municipal corporations have authority from the State

Constitution to adopt and enforce ordinances "not in conflict with the general law" Article XI, Sec. 5. The Legislature has further granted to cities and towns power to "pass all ordinances and rules, and make all regulations, not repugnant to law" U.C.A. Sec. 10-8-84 (1953 as amended.) A municipality can enact and enforce ordinances that are consistent with relevant state law.

This appeal presents a case where the Logan City ordinance enforced against Appellant is consistent in every respect with state law except for the penalty provision codified under a different title.

Appellant was prosecuted and found guilty by a jury of furnishing tobacco to a minor in violation of Logan Municipal Code Sec. 9.24.040 which provides that "It is unlawful for any person to sell, give or furnish any cigar, cigarette or tobacco in any form to any person under nineteen years of age." The ordinance does not specify a penalty. However, in section 1.16.010 the following general penalty provision is given: "All violations of this municipal code for which no lesser penalties are provided, are classified as class B misdemeanors, punishable by a fine not to exceed the sum of one thousand dollars, or by imprisonment in the county jail not to exceed six months or by both such fine and imprisonment."

The comparable statute under Utah law is found in U.C.A. Sec. 76-10-104 (1953 as amended) which provides in almost identical language to the city ordinance: "Any person who sells,

gives, or furnishes any cigar, cigarette, or tobacco in any form, to any person under 19 years of age, is guilty of a class C misdemeanor on the first offense, a class B misdemeanor on the second offense, and a class A misdemeanor on subsequent offenses."

The Appellant was charged as a first offense. Under the city penalty provision the offense is a class B misdemeanor but under state law is a class C misdemeanor. Appellee admits that the city penalty provision, section 1.16.010, is void or unenforceable because it is not consistent with general state law. Appellee maintains, however, that the separate ordinance which defines the objectional conduct, which Appellant was found guilty of violating, section 9.24.040, is completely consistent with state law and should not be held invalid

A. UNDER THE UTAH SUPREME COURT'S HOLDING IN ALLGOOD V. LARSON SECTION 9.24.040 OF THE LOGAN MUNICIPAL CODE SHOULD BE FOUND VALID AND APPELLANT'S CONVICTION UPHELD.

The Utah Supreme Court dealt with a situation similar to the immediate case in Allgood v. Larson, 545 P.2d 530 (Utah 1976.) In Allgood, the defendant was arrested, charged and convicted of trespassing under a Salt Lake City ordinance. The city ordinance provides "that it shall be unlawful for any person to walk upon the premises of another without permission of the owner or occupant." Revised Ordinances of Salt Lake City section 32-3-3. Like the immediate case, the Salt Lake City trespassing ordinance does not provide for a penalty. However, section 26-1-8 of the Revised Ordinances of Salt Lake City provides that when there is

no other penalty prescribed, the person "shall be punished by a fine not exceeding \$299, or imprisonment in the city jail for a period not longer than six months, or by both such fine and imprisonment."

The trespass Allgood engaged in is an infraction under state law which clearly cannot result in imprisonment. U.C.A. sec. 76-6-206(3). Allgood was, however, under the city ordinance, sentenced to six months in jail. On a habeas corpus preceding the district court ordered that Allgood be released from custody. The Utah Supreme Court affirmed the trial court's action and held: "if the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void. The charter or ordinance penalty cannot exceed that of the state law." Allgood, 545 P.2d 530, 532 (Emphasis added.)

The court in Allgood, as Appellant in the immediate case concedes, did not find the trespass ordinance, section 32-3-3, void but merely the separate penalty provision, section 26-1-8, which provided for jail time.

In the immediate case Appellant's attorney moved the court to dismiss the charges based on the inconsistency between the state and city penalty provisions. The trial court Judge, Rodger Bean, denied the motion but, consistent with Allgood, determined the city penalty provision was invalid and sentenced Appellant under general state law as a class C misdemeanor. The court believed there was no prejudice to Appellant. (Sentencing

Transcript p.8)

Appellant's sentence was to pay a \$300.00 fine (including the state assessment) and serve 30 days in jail. The judge put Appellant on 6 months informal probation and agreed to suspend \$100.00 of the fine and all the jail time upon successful completion of probation.

From every perspective, Defendant has been treated as though he committed a class C misdemeanor. The Verdict form signed by the jury foreperson, included in Appellant's brief, shows he was convicted of a class C Misdemeanor. His sentence was for a class C misdemeanor. He has received all benefits of the more lenient law, the state law. There has been no prejudice against him or violation of any of his substantial rights.

B. A SAVINGS CLAUSE CONTAINED IN THE LOGAN MUNICIPAL CODE WORKS TO FURTHER PROTECT THE VALIDITY OF THE CITY TOBACCO ORDINANCE.

Section 1.01.100 of the Logan Municipal Code provides for the severability of the penalty provision, section 1.16.010, in order to protect the substantive provision, section 9.24.040, which makes furnishing tobacco to minors a criminal offense. Section 1.01.100 provides:

If any section, subsection, sentence, clause or phrase of this code is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this code. The council declares that it would have passed this code, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases had been declared invalid or unconstitutional, and if for any reason this code should be declared invalid or unconstitutional, the original ordinance or ordinances shall

be in full force and effect.

Even though the Code suggests it is acceptable to remove objectionable clauses and phrases within a section or subsection this court is not asked to do that. All of section 9.24.040 is consistent with general state law and should be upheld. Section 1.16.010 is admittedly inconsistent and should be voided in this case.

II

THE TRIAL COURT'S TREATMENT OF APPELLANT'S MOTION TO DISMISS AND APPELLEE'S MOTION TO AMEND THE INFORMATION DID NOT PREJUDICE APPELLANT OR VIOLATE HIS SUBSTANTIAL RIGHTS.

During the trial, Appellant moved the court for it's order dismissing the information filed against Appellant because of the conflict, discussed above, between the penalty provision of the city ordinance and the relevant state statute. In response to Appellant's motion Appellee offered to amend the information to change the charge from a city ordinance to state statute. It was discussed that such a motion would also require amending the plaintiff from the City to the State. The court took both parties' motions under advisement and in the interest of the witnesses' and jury's time proceeded with the trial. (Transcript p.48-53, 58-68.)

The motion to dismiss was raised again at the conclusion of the presentation of Appellee's case. And, again, Appellee's proposed amendment was discussed. The court indicated that it would tentatively grant the prosecution's motion to amend the information in order to get the factual questions to the jury.

The court made it clear however that the motions were still under advisement. (Transcript p.88-92.)

At the conclusion of the case, and before actually deciding the parties motions, the court instructed the jury in the following fashion:

There are a couple of things we've done. We've amended the pleading to show State of Utah as the plaintiff. We won't explain to you all of the reasons for this. It shows State of Utah as the plaintiff in the action rather than Logan City. Mr. Wyatt's role here is a representative of the State of Utah, and that's permitted under the statute at this present time. Another change is that the offense is a Class C misdemeanor, and you'll be instructed in these instructions to that effect rather than a Class B misdemeanor.

(Transcript p.109.)

At the conclusion of the trial the court indicated it would announce a decision on the 2 motions, both Appellant's motion to dismiss and Appellee's motion to amend, at sentencing which was to be set at some time in the future. (Transcript p.112-13.)

At sentencing the court denied both motions including Appellee's motion to amend. (Sentencing Transcript p.4.) The result was that the information was never actually amended. It was suggested to the jury that the amendment was granted when the court told the jury that it changed the plaintiff to the State and the charge to a class C misdemeanor. The court did not explain to the jury the basis for what it was doing to avoid confusion.

Appellant's argument here is that it was improper to grant Appellant's motion to amend. The argument is misplaced as the

court did not grant such a motion. The Appellant's only real argument here would be that he was prejudiced in some significant way by the court's telling the jury the plaintiff had been changed from the City to the State even though it had not.

Appellee's position here is that the court's conduct in tentatively granting the motion, while keeping it under advisement, and then actually denying the motion did not prejudice the defendant or violate any of his substantial rights.

III

APPELLANT IS PRECLUDED FROM CHALLENGING THE CONSTITUTIONALITY OF LOGAN MUNICIPAL CODE 9.24.040

Defendant raises for the first time on this appeal a claim that the ordinance he was charged and convicted with is unconstitutionally vague. Appellant did not raise this issue at trial, and therefore, should be precluded from doing so here. Nevertheless, if the court chooses to allow him to raise the argument here Appellee maintains the ordinance is not unconstitutionally vague.

A. APPELLANT'S FAILURE TO RAISE HIS CONSTITUTIONAL CHALLENGE TO THE CITY ORDINANCE DURING THE TRIAL PRECLUDES HIM FROM DOING SO ON THIS APPEAL.

Case law is clear: "Generally, a defendant who fails to bring an issue before the trial court is barred from asserting it initially on appeal. Utah's appellate courts have applied this rule to constitutional questions advanced for the first time on appeal." State v. Archambeau, 820 P.2d 920, 921 (Utah App. 1991.)

The fact that Appellant did not raise this issue at trial

should preclude him from raising it at this late date. The courts have, however, two limited exceptions to the general rule barring Appellant from raising an issue for the first time on appeal. The first exception is if the trial court committed "plain error;" the second is if there are "exceptional circumstances." Archambeau, 820 P.2d 920, 921.

1. THIS IS NOT A CASE OF EXCEPTIONAL CIRCUMSTANCES.

Appellant argues there are "exceptional circumstances" because he was "not given adequate notice that he would be prosecuted under the statute." (Brief p.30.) Appellant is apparently claiming that the so-called amendment, which was not actually granted, to change the charge from City ordinance to State statute created the exceptional circumstances. Appellant was prosecuted and tried for violating the City ordinance, the same ordinance the original information alleged he violated. Even if the information had been amended to state statute the language of the prohibited conduct in the two ordinances are virtually identical. (See discussion above.) It is Appellee's position that this is not exceptional circumstances as contemplated by Utah courts.

2. THIS IS NOT A CASE OF PLAIN ERROR.

Appellant also argues "plain error" by concluding the court committed plain error. Appellant does not however, offer anything specific as to what the plain error was.

None of the Appellant's substantial rights were violated here. His liberty interests are not a stake. Appellant should

be precluded for raising this issue for the first time on appeal.

**B. LOGAN MUNICIPAL CODE SECTION 9.24.040 IS NOT
UNCONSTITUTIONALLY VAGUE ON ITS FACE OR AS APPLIED TO
THE FACTS OF THIS CASE.**

Even though Appellant should not be allowed to raise the issue of the constitutionality of the ordinance, Appellee maintains it is not unconstitutionally vague.

Appellant has a difficult burden here. "Legislative enactments are presumed to be constitutional, those who challenge a statute or ordinance as unconstitutional bear the burden of demonstrating its unconstitutionality." Greenwood v. North Salt Lake, 817 P.2d 816, 818 (Utah 1991)

In Greenwood the court provides guidance for a challenge of vagueness. "In challenging the ordinance on its face, plaintiffs must show that it is 'invalid in toto--and therefore incapable of any valid application' Unless the enactment is vague in all its applications, it is ordinarily not unconstitutional on its face. In that case, we must then determine whether the ordinance is vague in its application to the facts of the case." 817 P.2d at 819. (Citations omitted, Emphasis added.)

Appellant has not met his burden of showing the ordinance is vague in all its applications therefore the court should find it is not unconstitutional on its face. Further it is not vague in its application to the facts of this immediate case. The city ordinance and state statute both clearly prohibit selling tobacco to a minor under 19 years of age.

It is uncontroverted that Appellant knowingly sold tobacco

to Jerren Barson, a boy who was 16 years old. Appellee's position is that Appellant knew the boy was not old enough to have cigarettes but sold them to him anyway. And that the jury believed the boy was telling the truth when he testified that Appellant asked him how old he was but he did not respond to the question. It is uncontroverted that Appellant did not ask for identification to help him make such a determination.

(Transcript p.102.) Appellant apparently claims he reasonably tried to find out the boy's age through questions and was satisfied he was old enough. Appellee maintains that the jury did not accept this story and found him guilty.

It is significant that the boy testified he went to 20 stores, ten on the same day and ten on another day, and attempted to purchase cigarettes from all of them--but only one, the Appellant--sold to him. (Transcript p.71, 75.)

IV

APPELLANT HAS FAILED TO ESTABLISH THAT THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION.

To make a successful argument based on sufficiency of evidence the appellant is obligated to "[1] marshall all the evidence supporting the verdict and then [2] demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Cambelt International Corp. v. Dalton, 745 P.2d 1239, 1241 (Utah 1987.) Appellant has failed to meet this burden.

A. APPELLANT FAILED TO MARSHALL ALL THE EVIDENCE IN SUPPORT OF THE JURY VERDICT.

First, Appellant has failed to marshall all the evidence supporting the verdict. Appellee called 4 witnesses: Jerren Barson a 16 year-old boy (Transcript p.70-79), Officer J.G. Geier (Transcript p.79-87) and Gil Duron (Transcript p.70) of the Logan City Police Department and Todd Barson (Transcript p.69) of the State Health Department. All four witnesses provided evidence in support of the jury verdict. Appellant's brief only discusses Jerren Barson in two sentences and a brief mention to J.G. Geier in one sentence. (Brief p.40.)

Appellant has not even provided this court with a complete transcript of the testimony of Appellee's witnesses. The transcript indicates that Gil Duron and Todd Barson testified but their testimony was not transcribed. (p.69-70.)

The fact that Appellant has failed to provide the court with a complete transcript is fatal to his argument here. In Cornish Town v. Koller, 758 P.2d 919 (Utah 1988), Koller made an argument similar to Appellant's in the immediate case. Like this Appellant, Koller did not provide the court with a complete transcript. The court stated that, "Kollers have failed to provide the Court with the entire transcript of the proceedings below. This Court has repeatedly held that an appellant may not succeed on a claim of error when relevant portions of the record are not before us; in such a case, the proceedings before the trial court are presumed to support the trial court's findings."

Cornish, 758 P.2d 919, 921. (Emphasis added.)

B. APPELLANT HAS FAILED TO DEMONSTRATE THAT, EVEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THAT VERDICT, THE EVIDENCE IS INSUFFICIENT TO SUPPORT IT.

The Utah Supreme Court said in Cambelt that "The burden on an appellant to establish that the evidence does not support the jury's verdict and the factual findings implicit in that verdict under such a circumstance is quite heavy. We consider the evidence in the light most favorable to the verdict, and we will not overturn that verdict when it is supported by substantial and competent evidence." 745 P.2d 1239, 1241. Viewing the evidence in the light most favorable to the jury verdict shows the jury had a reasonable basis to find Appellant guilty.

Appellee's witness Jerren Barson testified that "I went up there and asked for a pack of Camel Lights and he [Appellant] goes, 'are you 19?' And I didn't say nothing. Then he just gave them to me with a pack of matches, and then I went back to the car." (Transcript p.73.) That testimony, particularly in light of what the other witness testified to, remembering that there is no transcript of two of the prosecutions witnesses' testimony, is substantial and competent and supports the jury verdict. Appellant agreed with Jerren's testimony. He agreed that he sold the cigarettes to him. He testified that he did not ask for verification of his age by requesting to see Jerren Barson's drivers license. Appellant's only disagreement is that he said Jerren Barson told him he was old enough to purchase the cigarettes. (Transcript p.101-02.) Appellant's own testimony

supports the verdict of guilty.

The jury found Appellant guilty of selling tobacco to a minor. The evidence supported that finding and this court should uphold the verdict.

V

APPELLANT WAIVED HIS RIGHT TO BE SENTENCED WITHIN 30 DAYS FOLLOWING THE TRIAL.


Appellant admits in his Brief that he consented to being sentenced later than thirty days following the trial. (p.42-43.) Appellant then asked to continue the dated set for sentencing even further because of a conflict in Appellant's attorney's schedule which the court accommodated. Judge Bean explains the facts surrounding the sentencing date in his memorandum decision attached as an exhibit to Appellant's brief.

To void Appellant's sentence because of his waiver and then the scheduling conflict of his and his own attorney's making would not serve justice. The court acted properly in sentencing Appellant because of Appellant's waiver to the 30-day period and then subsequent motion for continuance.

CONCLUSION

Based on the foregoing the conviction of Appellant should stand.

DATED this 12 day of August, 1993.


Scott L. Wyatt

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing BRIEF OF APPELLEE, postage prepaid to Appellant Lowell D. Carlsen at 720 North 400 East, Logan, Utah 84321 this 12 day of August, 1993.



Scott L Wyatt