

1992

Logan v. Carlsen : Petition for Rehearing

Utah Court of Appeals

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Scott L. Wyatt; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

LOGAN CITY, :
Plaintiff-Appellee, : Case No. 920739-CA
-vs- : Case Type: APPEAL
LOWELL D. CARLSEN, : Priority No. 2
Defendant-Appellant. :

PETITION FOR REHEARING

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

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DEC 28 1993

APPEALS

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
Plaintiff-Appellee,	:	Case No. 920739-CA
-vs-	:	Case Type: APPEAL
LOWELL D. CARLSEN,	:	Priority No. 2
Defendant-Appellant.	:	

PETITION FOR REHEARING

The Defendant-Appellant, Lowell D. Carlsen, by and through his attorney, A. W. Lauritzen and pursuant to Rule 35 of the Utah Rules of Appellate Procedure, and hereby respectfully submits this petition for rehearing.

The granting of this petition seems compelling in light of the following points:

Point 1. The Court overlooked or misapprehended the Defendant's challenge to Section 9.24.040 of the Revised Ordinances of Logan City under the principles of Allgood v. Larson.

Point 2. The Court overlooked or misapprehended the issues raised by the Defendant relating to the Amendment of the Information.

Point 3. The Court overlooked or misapprehended the impact of the Court not writing a written opinion.

DISCUSSION OF POINT 1

Point 1. The Court overlooked or misapprehended the Defendant's challenge to Section 9.24.040 of the Revised Ordinances of Logan City under the principles of Allgood v. Larson.

The Defendant was charged by Information in the trial court of selling tobacco products to a person under the age of nineteen in violation of Section 9.24.040 of the Revised Ordinances of Logan City, a class B misdemeanor.

The provisions of Section 9.24.040 of the Revised Ordinances of Logan City provides as follows:

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 pertinent part of U.C.A. § 10-3-704, (1977 Amendment) provides as follows:

Any ordinance passed by the governing body, after the effective date of this act, shall contain and be in substantially the following order and form:

(6) When applicable, a statement indicating the penalty for violation of the ordinance or a reference that the punishment is covered by an ordinance which prescribes the fines and terms of imprisonment for the violation of a municipal ordinance; or, the penalty may establish a classification of penalties and refer to such ordinance in which the penalty for such violation is established;

The provisions of Section 9.24.040 of the Revised Ordinances of Logan City fails to provide a penalty. Section 9.24.040 of the Revised Ordinances of Logan City fails to comply with the provisions of U.C.A. § 10-3-704 because the ordinance does not contain a statement indicating the penalty for violation of

the ordinance or a reference that the punishment is covered by an ordinance which prescribes the fines and terms of imprisonment for the violation of the ordinance; or, the penalty may establish a classification of penalties and refer to such ordinance in which the penalty for such violation is established.

The Defendant was charged by Information in the Circuit Court with a class B misdemeanor violation under the provisions of Section 1.16.010 of the Revised Ordinances of Logan City which provides as follows:

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.

Defense counsel, subsequent to the jury being impanelled and sworn in this case moved for dismissal of the Information on grounds that the ordinance under which the Defendant was charged a class B misdemeanor was in conflict with the general laws of the State of Utah under the principles of Allgood v. Larson, 545 P.2d 530 (Utah 1976). The prosecutor then moved the Court to amend the Information to prosecute the Defendant in the name of the State of Utah for violating the provisions of U.C.A. § 76-10-104, (1953 as amended) as a class C misdemeanor.

The provisions of U.C.A. § 76-10-104, (1953 as amended)

provides as follows:

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.

Logan City in its Brief filed in this Court on appeal at pages 4-5 admits and concedes that the penalty provided under Section 1.16.010 for violating Section 9.24.040 of the Revised Ordinances of Logan City is void or unenforceable because it is not consistent with general state law under the principles of Allgood v. Larson, supra.

Assuming for the sake of argument that Section 9.24.040 of the Revised Ordinances of Logan City is in compliance with the provisions of U.C.A. § 10-3-704 as to its form and contents, but the penalty provisions is void and unenforceable as admitted and conceded by Logan City, the ordinance has been designated as an Infraction by the Utah Legislature under the provisions of U.C.A. § 76-3-105, (1973 Amendment) which provides as follows:

(1) Infractions are not classified.

(2) Any offense which is an infraction within this code is expressly designated and any offense defined outside this code which is not designated as a felony or misdemeanor and for which no penalty is specified is an infraction.

Section 9.24.040 of the Revised Ordinances of Logan City is not designated a felony or misdemeanor and fails to provide any penalty and therefore can only be designated as an infraction under the provisions of U.C.A. § 76-3-105.

Assuming for the sake of argument that Section 9.24.040 of the Revised Ordinances of Logan City is designated as an Infraction under U.C.A. § 76-3-105, the jury had no lawful authority to render a verdict on an Infraction.

The pertinent part of U.C.A. § 77-1-6, (1980 Amendment) provides as follows:

(1) In criminal prosecutions the defendant is entitled:

(2) In addition:

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Furthermore, the pertinent part of the provisions of Rule 17 of the Utah Rules of Criminal Procedure provides as follows:

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

The jury verdict rendered in this case for an offense designated as an Infraction under U.C.A. § 76-3-105 should be vacated because it was not authorized by law and the verdict was not rendered by a magistrate as required by law.

The Utah Supreme Court in State v. Gallion, 572 P.2d 683 (Utah 1977) held that under the provisions of Article V, § 1 and Article VI, § 1 of the Utah Constitution that the legislative power to make a determination of the elements of a crime and the appropriate punishment are exclusively within the judgment of the Utah Legislature and cannot be delegated to a person in the executive branch of government, State v. Green, 793 P.2d 912 (Utah App. 1990), or to the courts, State v. Johnson, 44 Utah 18, 137 P. 632 (1913).

The trial court in this case at sentencing designated and classified Section 9.24.040 of the Revised Ordinances as a class C misdemeanor and imposed sentence thereon as a class C misdemeanor.

As the Court noted in Gallion, 572 P.2d at 688, the state constitutional requirement that the essential legislative function of specifying and punishing conduct as criminal be performed by the legislature itself, is incorporated into U.C.A. § 76-1-105, (1978 Amendment), which states: "Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance."

Section 9.24.040 of the Revised Ordinances of Logan City does not specify that a violation of the ordinance is a crime.

Assuming for the sake of argument that Section 9.24.040 of the Revised Ordinances of Logan City is designated as an Infraction under U.C.A. § 76-3-105, the trial court erred in sentencing Defendant on a class C misdemeanor by imposing a term of imprisonment of 30 days in the Cache County Jail suspended upon the payment of a fine of \$ 200.00.

The pertinent part of U.C.A. § 76-3-205, (1973 Amendment) provides as follows:

- (1) A person convicted of an infraction may not be imprisoned but may be subject to a fine, forfeiture, and disqualification, or any combination.

The trial court relied upon this Court's decision in Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990) in classifying Section 9.24.040 of the Revised Ordinances of Logan City as a class C misdemeanor and imposing sentence thereon. However, there is a clear distinction between the instant case and the municipal ordinance involved in Richfield City v. Walker, supra, where both the municipal ordinance and the state statute for the offense of Driving under the Influence of Alcohol were classified as class B misdemeanors.

The Defendant therefore respectfully submits that this issue should be reconsidered by the Court on this appeal and the conviction of the Defendant should be reversed because the ordinance, Section 9.24.040 of the Revised Ordinances of Logan City does not comply with U.C.A. § 10-3-704 as to its form and contents and because no magistrate has rendered a verdict of guilt to Section 9.24.040 which can only be

designated as an Infraction under the provisions of U.C.A.
§ 76-3-105.

DISCUSSION OF POINT 2

Point 2. The Court overlooked or misapprehended the issues raised by the Defendant relating to the Amendments to the Information.

The Defendant raised as an issue on appeal that the trial court erred in granting the prosecution's motion to amend the Information changing the name of the prosecuting party from a municipal corporation, Logan City to the State of Utah; changing from charging the Defendant with violation of a municipal ordinance, Section 9.24.04 of the Revised Ordinances of Logan City to charging the Defendant with violating the provisions of U.C.A. § 76-10-104; and changing the charge of the Defendant from a class B misdemeanor to a class C misdemeanor.

Reconsideration of this issue by the Honorable Court seems compelling in light of the argument and discussion under Point 1 of this Petition.

The pertinent part of Rule 4 of the Utah Rules of Criminal Procedure provides as follows:

(d) The Court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

The Defendant's substantial rights were prejudiced by the amendments to the Information by the continuation of the prosecution when it should have been terminated because the ordinance under which the Defendant was charged, Section 9.24.040 of the Revised Ordinances of Logan City fails to comply with the provisions of U.C.A. § 10-3-704, (1977 Amendment) as to its form and contents and the penalty and classification as a class B misdemeanor for violation of the ordinance as provided under Section 1.16.010 of the Revised Ordinances of Logan City is void or unenforceable as admitted or conceded by Logan City in its Brief under the principles of Allgood v. Larson, supra.

The Defendant's substantial rights were further prejudiced by the amendments to the Information charging him with violating U.C.A. § 76-10-104, (1953 as amended) as a class C misdemeanor rather than prosecuting him on an Infraction by dispensing with the jury and having judgment rendered by a magistrate as to his guilt or innocence to the offense under Section 9.24.040 of the Revised Ordinances of Logan City which can only be designated under the provisions of U.C.A. § 76-3-105 as an Infraction.

Prosecutorial discretion to seek varying degrees of punishment by proving identical elements of a crime violates Equal Protection of the Laws under the Fourteenth Amendment to the United States Constitution. State v. Hodgson, 722

P.2d 1336 at 1340 (Wash. App. 1986).

The elements of the two offenses as defined under Section 9.24.040 of the Revised Ordinances of Logan City and U.C.A. § 76-10-104 are identical. The difference between the ordinance and statute are the possible penalties and classification for the two offenses. The prosecutor in this case had the discretion to seek varying degrees of punishment by proving identical elements of an alleged crime which violated Defendant's right to Equal Protection of the Laws.

The Colorado Supreme Court in Cervantes v. People, 715 P.2d 783 at 786 (Colo. 1986) quoting Bustamante v. People, 317 P.2d 885, 887 (1957) held that the sufficiency of an information is a matter of jurisdiction, so any conviction based on an information requiring major amendments is void.

The Defendant's conviction in the instant should be declared void because of the major amendments to the Information by changing the name of the prosecuting party from a municipal corporation, Logan City to the State of Utah; from violation of a municipal ordinance to a state statute, U.C.A. § 76-10-104; and from a class B misdemeanor to a class C misdemeanor which at most should have been an Infraction if the penalty provisions for violating Section 9.24.040 of the Revised Ordinances of Logan City is void or unenforceable.

DISCUSSION OF POINT 3

Point 3. The Court overlooked or misapprehended the

impact of not making a written opinion in this matter.

The Utah Supreme Court in State v. Gardiner, 814 P.2d 568 at 570 n. 1 (Utah 1991) observed as follows:

We note with some concern the court of appeals' use of Rule 31 of the Utah Rules of Appellate Procedure to dispose of this case via an unpublished opinion, even after Bradshaw was called to its attention. Rule 31 allows an appellate court to "dispose of any qualified case" in an unpublished opinion upon its own motion. However, by its own terms, the rule is not appropriate for use where there are "substantial constitutional issues, issues of significant public interest, issues of law of first impression, or complicated issues of fact or law." Utah R.App. 31.

Judge Bench in his dissenting opinion in State v. Gardiner, Id. at 581 observed as follows:

Finally, and with hindsight, I agree with the majority's comment that the Court of Appeals should have published its opinion in this case. In my view, publication of appellate opinions serves essentially two important purposes. It records and disseminates the development of the common law and it enables the public to monitor the quality of appellate judicial service.

The pertinent part of Rule 30 of the Utah Rules of Appellate Procedure, provides as follows:

(d) **Decisions without opinion.** If, after oral argument, the court concludes that a case satisfies the criteria set forth in Rule 31(b), it may dispose of the case by order without written opinion. The decisions shall have only such effect as precedent as is provided for by Rule 31(f).

The pertinent part of Rule 31 of the Utah Rules of Appellate Procedure, provides as follows:

(b) **Cases which qualify for expedited decisions.** The following are matters which the court may consider for expedited decision without opinion.

(1) appeals involving uncomplicated factual issues based primarily on documents;

(2) summary judgments;

(3) dismissals for failure to state a claim;

(4) dismissals for lack of personal or subject matter jurisdiction; and

(5) judgments or orders based on uncomplicated issues of law.

The Defendant respectfully submits that the issues raised by him on appeal do not fit within the criteria of Rule 31(b) of the Utah Rules of Appellate Procedure for an expedited order affirming his conviction without written opinion.

The first issue raised by Defendant on appeal raises a substantial question of law and a substantial constitutional question involved. Could the Defendant be prosecuted, convicted, and sentenced on a municipal ordinance in which the penalty and classification provisions for violation of the ordinance conflicts with the general laws of the State of Utah?

The second issue raised by Defendant on appeal raises a complicated issue of fact and law, a substantial question of constitutional law and law of first impressions in the State of Utah. Did the Logan City Prosecutor have constitutional authority to prosecute in the name of the State of Utah and did the trial court error by granting the prosecution's motion

to amend the Information changing the name of the prosecuting party from Logan City to the State of Utah; changing the charge from a municipal ordinance to a state statute; and changing the offense from a class B misdemeanor to a class C misdemeanor rather than an Infraction. This issue raised by the Defendant on appeal has not been previously decided by the Courts in the State of Utah.

The third issue raised by the Defendant on appeal raises a substantial question of constitutional law and a law of first impressions in the State of Utah. The Utah Courts have not previously decided whether a challenge to the constitutionality of a statute or ordinance constitutes a challenge to the Court's subject matter jurisdiction and can be raised for the first time on appeal under Rule 12 of the Utah Rules of Criminal Procedure. The Utah Courts have not previously decided the constitutionality of U.C.A. § 76-10-104 or Section 9.24.040 of the Revised Ordinances of Logan City on grounds of vagueness.

The fourth issue raised by the Defendant on appeal raises a complicated issue of both fact and law; and the issue raises a law of first impressions in the State of Utah. The Utah Courts have not previously decided any issue involving the offense as defined under U.C.A. § 76-10-104. Is it a strict liability statute or was the Defendant en-

titled to the defense of mistake of fact as to the age of Jerren Barson? Was the evidence adduced at trial sufficient to sustain the conviction of the Defendant or did the failure to include in the Record on Appeal, the Plaintiff's Exhibits introduced as evidence at trial preclude this Court from rendering a decision on the issue. State v. Taylor, 664 P.2d 439 (Utah 1983).

CONCLUSION

The Defendant respectfully submits that the issues raised by the Defendant on appeal should be reconsidered and Defendant's conviction should be reversed and remanded to the trial court with instructions to dismiss the Information or as an alternative, this matter be restored to the calendar for resubmission.

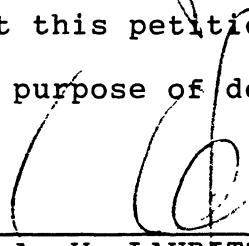
RESPECTFULLY SUBMITTED on this 27th day of December, 1993.



A. W. LAURITZEN

CERTIFICATE OF GOOD FAITH

Counsel certifies that this petition is submitted in good faith and not for the purpose of delay.

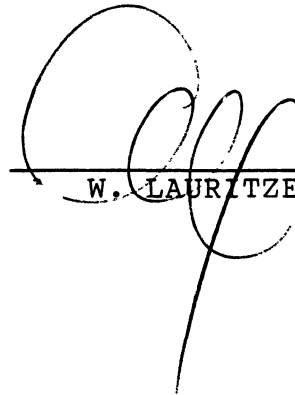


A. W. LAURITZEN
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and correct copies of the foregoing Petition for Rehearing, postage prepaid, to the following listed below on this 27th day of December, 1993.

Scott L. Wyatt
Logan City Prosecutor
255 North Main
Logan, Utah 84321



W. LAURITZEN

A D D E N D U M

NOV 19 1993

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Mary T. Noonan
Clerk of the Court

Case No. 920739-CA

Dated this 19th day of November, 1993.

Russell W. Bench
Russell W. Bench, Judge

Norman H. Jackson
Norman H. Jackson, Judge

Leonard H. Russon
Leonard H. Russon, Judge

codified in this chapter, is described as follows: One and one-half to one and three-fourths inches in diameter, the impression of which represents an eagle perched on a beehive and the inscription "Corporate Seal of Logan City," and two stars in the margin, is declared to have been, that it is now, and hereafter shall be the corporate seal of the city. (Prior code §1-4-1)

1.12.020 City name. The official name of the city shall hereafter be styled as "The City of Logan." (Prior code §1-4-2)

Chapter 1.16

GENERAL PENALTY

Sections:

- 1.16.010 Violation--Class B misdemeanor.
- 1.16.020 Violation--Misdemeanor.
- 1.16.030 Continuing violation.
- 1.16.040 Liability--Officer, agent or servant of corporation.
- 1.16.050 Accessories.
- 1.16.060 Prisoner labor.

1.16.010 Violation--Class B misdemeanor. 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. (Added during 1989 codification)
~~Twenty one years to visit or frequent or remain in such establishment where beer is sold or offered for sale for consumption on the premises. (Prior code §12-7-2)~~

9.24.030 Persons under the age of nineteen years--Tattooing. No person shall tattoo any person under the age of nineteen years. (Prior code §12-7-3)

9.24.040 Persons under the age of nineteen years--Sale of tobacco to. 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. (Prior code §12-7-4)