1970

State of Utah v. Charles R. Knowles : Respondent's Brief

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

CHARLES R. KNOWLES,
Defendant-Appellant.

Case No.
12038

BRIEF OF RESPONDENT

Appeal From an Order Revoking Probation of the Defendant-Appellant in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Merrill C. Faux, Judge, Presiding.

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NATURE OF THE CASE

Appellant was placed on probation following his conviction for obtaining money under false pretenses, which probation was revoked December 17, 1969.

DISPOSITION IN LOWER COURT

A hearing on an order to show cause why appellant's probation should not be revoked resulted in appellant's commitment to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent asks this Court to affirm the order of the District Court revoking appellant's probation.

STATEMENT OF FACTS

Respondent generally agrees with the facts as set forth

in appellant's statement (Brief, at 2-5), but wishes to set forth the following items:

1. Appellant claims that Deputy Hanks told appellant's wife to "remove from the house any stolen property" (Brief, at 3), but the transcript indicates all the deputy said was that "Capt. Hayward and some deputies were coming out to the house" (R. at 63).

2. At page 4 of his brief, appellant claims no probable cause existed for the search of the truck his wife was driving, and that there was an illegal seizure of certain items therein. The official transcript indicates the items seized were in plain view (R. 66), and that Mrs. Knowles consented to the taking of the items (R. 68).

ARGUMENT

POINT I.

THE TRIAL COURT HAD AUTHORITY TO REHEAR DEFENDANT'S MOTION FOR A NEW TRIAL AND TO MODIFY ITS EARLIER ORDER.

On June 10, 1970, respondent moved this Court to make the minute entry of the trial court of March 29, 1968, a part of the official record in this case.

The entry shows the trial court reconsidered defendant's motion for a new trial (which it had granted: R. 46), and denied the same, recalling its earlier order granting the motion.

Appellant argues that the trial court lacked power to modify or revoke an order granting a new trial, relying on *Luke* v. *Coleman,* 38 Utah 383, 113 P. 1023 (1911).

In that case, this Court recognized and followed the California rule that an order granting a new trial cannot usually be modified. Appellant fails to mention the exception to the general rule he seeks to invoke: if such an order has been prematurely or inadvertently entered, it may be set aside on a proper showing. *Id.* at 387, *citing*: *Holtum* v. *Greif,* 144 Cal. 521, 78 Pac. 11.

More recently this Court held that Utah Rules of Civil Procedure 7(b) permits Utah judges to modify an order granting a new trial, although it did not consider the modifiableness of an order granted pursuant to a properly noticed and heard motion. *National Farmers Union Property and Casualty Co.* v. *Thompson,* 4 Utah 2d 7, 11, 286 P. 2d 249 (1955).

In *Drury* v. *Lunceford,* 18 Utah 2d 74, 415 P. 2d 662 (1966), this Court said:

> "[W]e also recognize that there may be situations where an order denying or granting a new trial may have been made by inadvertance or mistake, or where there was some irregularity in connection with the obtaining or granting of the order, in which instance the court could of course act to correct any such mistake or irregularity." *Id.* at 77.

The record indicates that the State was not represented at the hearing on defendant's motion (R. 46). In a letter

to the Court, State's Attorney Haycock indicated the circumstances resulting in his failure to appear at the hearing (R. 47-48). It would appear that the irregularity resulting in the failure of the State to be present when defendant's motion was first heard was of a nature as to allow rehearing of the motion, as contemplated in the *Drury* case, *supra.*

Respondent submits that appellant's contentions as to the modification of the order for new trial are without merit, and that therefore the lower court had jurisdiction to hear the probation revocation matter.

POINT II.

EVIDENCE INTRODUCED AT TRIAL WAS NOT OBTAINED AS A RESULT OF AN ILLEGAL SEARCH AND SEIZURE.

Appellant argues that the items seized from a truck driven by his wife were a result of an illegal search and seizure, and that his wife should have been advised of her rights (*Brief*, at 8).

However, no attempt was made to use the evidence seized against appellant's wife and the record clearly discloses that she consented to the seizure (R. 68).

This Court has never considered the ability of a wife to consent to a search which results in the seizure of evidence used against her husband at trial. Those jurisdictions that have dealt with the issue uniformly hold that a joint possessor can consent to such a taking. See, *State* v. *Kennedy*, 80 N. M. 152, 452 P. 2d 486 (1969).

The Idaho Supreme Court has held that the voluntary consent of an owner or possessor of a premises renders the search and seizure reasonable even though another person claims the constitutional protection. *State* v. *Gonzales,* 438 P. 2d 897 (1968); *reh. denied*: April 16, 1968.

In a case whose facts closely parallel instant appeal, the Oklahoma Court held evidence obtained from the search of the family car driven by the wife, pursuant to her consent, admissible against the husband at trial. *Camp* v. *State,* 70 Okla. Cr. 68, 104 P. 2d 572 (1940).

Respondent submits that since Mrs. Knowles had possession and control over the items seized, she could, and did, submit to the seizure of the items and no constitutional defects are present in their admission at the hearing.

POINT III.

PROBATION REVOCATION HEARINGS ARE NOT SUBJECT TO ALL THE DUE PROCESS SAFEGUARDS OF A CRIMINAL TRIAL.

Appellant's remaining contentions are basically grounded in his view that all the due process guarantees of criminal trials apply to probation revocation hearings. Primary reliance is placed on this Court's ruling in *State* v. *Bonza,* 106 Utah 553, 150 P. 2d 970 (1944) (*Brief,* at 10).

The following language of this Court, from *Velasquez* v. *Pratt,* 21 Utah 2d 229, 443 P. 2d 1020 (1968), seems dispositive of this contention:

> "The appellant appears to proceed upon the erroneous premise that on a hearing for violation of probation a person is entitled to the same protections the law affords one newly accused of an offense and before he is found guilty thereof. In the case of State v. Bonza, 106 Utah 553, 150 P. 2d 970, and also in the more recent one of Blaine v. Beckstead, 10 Utah 2d 4, 347 P. 2d 554, this court dealt with the question of revocation of probation, indicating that when a person has been found guilty of an offense and sentenced, he is in quite a different status than he is before conviction. He is deemed to be actually serving the sentence imposed, but under prescribed conditions which he has agreed to comply with. He is certainly not entitled to all of the protections accorded one accused of crime in the first instance. If he could insist on those rights, from the incipient protections relating to arrest, through the presumption of innocence, the right of counsel and trial by jury, the court might as well turn him completely free in the first place and not bother about probation. Such requirement would tend to destroy the system which has proved so useful and beneficial in penology, because judges would be very reluctant to grant probation." *Id.* at 231.

The question to be determined in such hearings is whether or not the conduct of the defendant is in violation of the terms and conditions of his probation agreement with the Court. *State* v. *Bonza, op. cit.,* at 558. As noted in *Velasquez,* judges would be reluctant to grant probation if they would be held to the same standards in revoking probation as in criminal trials.

Trial judges must be permitted to examine the totality

of circumstances in determining whether to revoke a defendant's probation. The testimony of a police officer as to the worth of the items seized and the fact that they were stolen represents an attempt of the court, not as appellant seems to feel, to determine the probationer's guilt of theft, but to ascertain whether or not his conduct has been such as to warrant revoking his status as a probationer.

CONCLUSION

Respondent respectfully asks this Court to affirm the action of the trial court in revoking appellant's probation.

Respectfully submitted,

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