1970

State of Utah v. Carlsen : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

CRAIG CARLSEN,

Defendant-Appellant.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Dist
First Judicial District of the State of Uta
County of Cache, the Honorable VeNoy
Judge, presiding.

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent,* vs. CRAIG CARLSEN, *Defendant-Appellant.*	Case No. 12116

BRIEF OF RESPONDENT

STATEMENT OF KIND OF CASE

The appellant appeals from a judgment on a jury verdict of guilty to a charge of Grand Larceny, rendered in the District Court of the First Judicial District of the State of Utah, in and for the County of Cache, the Honorable VeNoy Christoffersen, Judge, presiding.

DISPOSITION IN LOWER COURT

The appellant was charged by information with grand larceny. The jury found upon the evidence that appellant was guilty as charged. The court sentenced appellant to the statutory period, the sentence to run concurrent with present sentence being served for prior conviction on a separate charge.

RELIEF SOUGHT ON APPEAL

Respondent submits that the verdict and judgment of the court below should be affirmed, and that the case should be remanded for sentencing consistent with the laws of Utah.

STATEMENT OF THE FACTS

On December 19, 1968, Mr. Ted Wilson, the owner of the Cache Finance and Thrift, was sitting behind the counter in his place of business. A man came into the business place and grabbed a display plaque containing $1,650.00 and fled. Ted Wilson jumped over the counter and pursued the thief. Mr. Wilson chased appellant down the street in a direction west from the business place. Mr. Wilson apprehended appellant (Trial Tr. 21-23).

A complaint was immediately issued, wherein Ted Wilson did say that appellant committed the crime of grand larceny (R. 1).

Arraignment proceeding was conducted December 24, 1968, at which time defendant expressed desire for a preliminary hearing, which hearing was set for January 29, 1969. On date set for preliminary hearing, appellant waived the hearing and was bound over to the District Court to answer the charge of grand larceny (R. 4).

An information accusing appellant of grand larceny was filed March 4, 1960 (R. 10).

On March 10, 1969, appellant pleaded not guilty to the charge of grand larceny. Trial was set for June 26, 1969 (R. 87).

There were at least two other charges being processed against appellant while the grand larceny charge was pending (Tr. 3).

The fact there were several charges pending simultaneously against appellant had some effect on the pace that the case at bar was expedited.

One of the cases against appellant came on for sentencing June 9, 1969. Counsel for appellant requested psychiatric evaluation of appellant. The court then vacated the date June 26, 1969 — which had been set for the grand larceny trial (Tr. 7).

On June 25, 1969, the matter came on for further proceeding. Because of consideration of the psychiatric posture of appellant, the grand larceny case was continued until July 18, 1969 (Tr. 10) (R. 89).

On July 18, 1969, the court continued the matter to July 28, 1969. The further stay was granted on the grounds that the inquiry into the mental condition of appellant was not concluded (Tr. 14).

The Court was very upset that the doctors were not more cooperative on the matter (Tr. 14, 15).

On August 11, 1969, the matter came on for further proceedings. The matter was continued to August 14, 1969.

On August 14, 1969, the court announced that appellant was sane to stand trial. Sentence was imposed for some separate charges — not having to do with the Cache County Finance Co. theft. The court then said of the mat-

ters concerning the Cache County Finance Company theft, "they remain pending" (Tr. 26).

On November 7, 1969, appellant, while serving prison sentence, filed request for final disposition of the charges pending against him (R. 14).

On November 17, 1969, the grand larceny case was remanded to city court for a preliminary hearing. At the preliminary hearing which was conducted December 16, 1969, appellant was bound over to the District Court for trial (R. 8).

A second information accusing defendant of grand larceny was filed December 23, 1969 (R. 20).

On January 5, 1970 arraignment proceeding was conducted. Appellant pleaded not guilty. Trial was set for January 7, 1970 (R. 96).

On January 7, 1970, the jury was present and State's attorney was ready for the trial. Defense attorney asked for a dismissal on the grounds that appellant had not been afforded a speedy trial (R. 97). The court then continued the matter — on its own motion — to consider the motion of appellant (Trial Tr. 9).

On February 17, 1970, the defendant's motion to dismiss was denied and the trial was set for April 8, 1970 (R. 33). The judge stated good reasons existed for continuing the trial (Trial Tr. 10). Two of the reasons being that defense attorney had been appointed as prosecutor and that the calendar was crowded.

Trial was conducted before a jury on April 9, 1970. The jury returned a verdict finding the defendant guilty of grand larceny as charged in the information (R. 79). Defendant was thereafter sentenced, the sentence to run concurrently with his present sentence (R. 81).

During the trial, appellant objected to the receipt of the plaque containing the four bills into evidence on the grounds that there had not been shown a continuity of possession (Trial Tr. 85).

Going back to the beginning, after appellant was apprehended by Mr. Wilson, the display plaque, which contained a $1000.00 bill, a $500.00 bill, a $100 bill, and a $50.00 bill was found lying on the ground near where appellant was apprehended. A police officer testified that he took pictures of the plaque while it was lying on the ground, and that he thereafter took custody of the plaque. The officer took measurements of the plaque and serial numbers of the bills (Trial Tr. 58, 59). The plaque was turned over to the bank, and a receipt was given to the officer (Trial Tr. 60).

At the request of Mr. Wilson, on June 25, 1969, the court ordered that the plaque be given back pending trial of the case (R. 13). However, before owner took the plaque away, a police office took more pictures of it (Trial Tr. 77).

The plaque was offered as State's exhibit number one. The court admitted it (Trial Tr. 86).

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN BRINGING DEFENDANT TO TRIAL APRIL 9, 1970, BECAUSE PURSUANT TO UTAH CODE ANN. § 77-51-1, UTAH CODE ANN. § 77-51-2, AND UTAH CODE ANN. § 77-65-1 THE COURT GRANTED REASONABLE AND NECESSARY CONTINUANCE FOR GOOD CAUSE AND SUFFICIENT REASON SHOWN.

Right to a speedy trial is a fundamental right secured by the Sixth Amendment and applies to States through the Fourteenth Amendment. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967).

But not all delays are inconsistent with the right to a speedy trial. The United States Supreme Court recently stated:

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. [Citation omitted.] Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances . . . The delay must not be purposeful or oppressive[.] [Citation omitted.] [T]he essential ingredient is orderly expedition and not mere speed." [Citation omitted.] *United States* v. *Ewell,* 383 U. S. 116, 120 (1966).

In *Ewell, Id.,* the defendants were charged, arrested,

and convicted for particular conduct. Their convictions were later vacated on the grounds the original indictments had not been sufficient. Fresh arrests and fresh complaints were made. The court stated "that the passage of 19 months between the original arrests and the hearings on the later indictments [does not demonstrate] a violation of the Sixth Amendment's guarantee of a speedy trial."

Thus, the mere passage of time does not amount to denial of a speedy trial. To secure defendant's right to have his case brought expeditiously before the court, our State has enacted statutes requiring dismissal of a case where it is not brought to trial within a certain period, *unless good cause is shown for a delay or continuance.* The appellant has pointed out three of these statutes in his brief, to wit: Utah Code Ann. § 77-51-1(2), Utah Code Ann. § 77-65-1 & -2; and § 77-1-8(6).

In support of his contention that his case should be dismissed under Utah Code Ann. § 77-51-1, the appellant cites *State* v. *Endsley*, 57 Pac. 430, 19 U. 478 (1899). The court in that case stated that the intent of the legislature was to secure a speedy trial by imposing a time limit, *in the absence of good cause being shown for delay.*

In *State* v. *Mathis*, 319 P. 2d 134, 7 U. 2d 100 (1957), which appellant positively cites, the Utah Court was in accord that the limitations in Section 77-51-1 are maximums, *unless good cause for continuance exists.* The granting of continuance will not be disturbed unless there is plain abuse of court's discretion.

Furthermore, it is provided by statute that a continuance is tolerable. Where defendant is not charged nor tried as provided in Section 77-51-1, "and sufficient reason therefor is shown, the court may order the action to be continued from term to term . . ." Utah Code Ann. § 77-51-2 (1953).

Respondent submits that the continuances granted by the court were based upon good cause and sufficient reason. In the early stages of the life of this case, there were at least two other charges pending against appellant. One was for an incident in another county. Another, a burglary charge, was based upon the same incident for which appellant was being charged with grand larceny. When one of the other cases came on for sentencing, appellant's counsel requested an inquiry into the mental condition of appellant. The case at bar had been set for trial; the judge vacated the setting pending trial of the other felony cases, and pending the psychiatric appraisal (Tr. 7).

There were several continuances up to August 14, 1969, at which time the court announced that appellant had been determined sane (Tr. 24). The court said of the cases rising out of Cache County Finance Company theft, that "they remain pending" (Tr. 26). Sentence was imposed for some other convictions. While in prison, appellant requested final disposition of the pending case (R. 14). Such request is pursuant to Utah Code Ann. § 77-65-1, which provides that when a person is in prison and requests final disposition of pending charges, he shall be brought to trial within 90 days:

"Provided, that for a good cause shown in open

court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

Ten days after appellant requested final disposition of cases pending against him, the grand larceny case was remanded to the city court. Preliminary hearing was conducted and appellant was bound over to the District Court for trial (R. 8). An information accusing defendant of grand larceny was filed December 23, 1969 (R. 20).

According to *State* v. *Belcher*, ... U. ....., (Case No. 12077, 1970), the 90 day period does not begin running until the information is filed where only a complaint is pending when request for final disposition is made. Thus, there is a question here whether the 90 day period began on November 7, 1969 when appellant's request was filed, or December 23, 1969 when an information was filed. However, that question is not really critical to case at bar because either way the case was set for trial within the 90 day period; trial was set for January 7, 1970 (R. 96). The matter was continued in order to consider *appellant's* motion to dismiss (Trial Tr. 9). The continuance was granted within the 90 day period. Appellant's motion to dismiss was denied and trial was set for April 8, 1970 (R. 33). The court stated that it had good reasons to continue the case — one being that defense attorney had been appointed to be a prosecutor and another one being a crowded calendar (Trial Tr. 10).

In *State* v. *Lozano*, 462 P. 2d 710, 23 U. 2d 312 (1969), the court reversed a conviction on the grounds defendant

had been denied right to speedy trial. The court on its own motion had made several continuances with no reason or cause showing in the record except mere recitals in the minute entries that there had been good cause.

Case at bar differs from *Lozano* in several instances. The major difference being that the judge below did more than merely indicate he was continuing for good cause – he did give some reasons: for example — time out for insanity hearings; time out because defense attorney had been appointed to be a prosecutor; and time out because there was a crowded calendar. Furthermore, the *Lozano* case was based in part on Utah Code Ann. § 77-1-8(6), which provides:

> "[E]very defendant in a criminal action unable to get bail shall be entitled to a trial within thirty days after arraignment . . ."

The defendant in that case was not able to get bond, thus he came under that provision. Appellant in case at bar originally had bail, (Tr. 4) but was later sent to the Utah State Prison on other charges and was not eligible for bail.

Regarding Utah Code Ann. § 77-1-8(6), the Utah Supreme Court has held that it is directory, not mandatory. "Where injustice to either party might ensue if the statute were mandatory through unintended circumstances, neither should suffer by a dead-line statute like this." In this respect each case must be examined in light of its own particular facts. *State* v. *Rasmussen,* 418 P. 2d 134, 18 U. 2d 201, 203 (1966).

POINT II.

THE COURT BELOW DID NOT ERR IN ADMITTING INTO EVIDENCE PLAINTIFF'S EXHIBIT NUMBER ONE.

Appellant was charged and convicted of the crime of grand larceny. The property involved was a plaque containing a $1,000 bill, a $500.00 bill, a $100.00 bill, and a $50.00 bill.

The plaque was located on a finance company wall. Appellant was accused of taking the plaque from the wall and fleeing with it. Complaining witness chased appellant down the street and apprehended him. Near the spot where he was apprehended, the plaque was found on the ground (Trial Tr. 34). A police officer testified that he saw the plaque on the ground, and that he took a picture of it (Trial Tr. 71). The officer also took measurements of the plaque and serial numbers of the bills (Trial Tr. 59). That picture was admitted — without objection — into evidence as plaintiff's exhibit No. 6 (Trial Tr. 71, 76).

Another officer testified that shortly after the theft took place, the plaque was turned over to the First National Bank; a bank official gave a receipt therefor (Trial Tr. 60). In fact, the bank official testified that he gave a description of the contents of the plaque upon his letterhead over his signature in exchange for the plaque (Trial Tr. 80). The plaque remained at the Bank several months.

At the request of the owner, the court ordered that the plaque be given back to the owner pending trial of the case

(R. 13). The officer who took pictures of the plaque while it was on the ground testified that he took pictures of it when it was returned to owner on June 25, 1969 (Trial Tr. 77).

The plaque was offered into evidence as State's exhibit number one. Defense counsel objected. The court admitted it (Trial Tr. 86).

Now, the appellant asserts that the court committed prejudicial error and abused its discretion by admitting the plaque into evidence.

The statute which appellant cites to substantiate his claim that the court cannot release exhibits from the possession of the court, is directed to custody of exhibits which have been admitted as evidence at a preliminary examination. Utah Code Ann. § 77-15-15 (1953). That statute does not preclude court from issuing order allowing owner to withdraw an exhibit pending trial.

Actually, the plaque was not offered for evidence until December 16, 1969, at which time it was admitted into evidence at the preliminary examination (R. 8).

The owner testified that the plaque had been in his care, custody, and keeping exclusively up until the date of the preliminary hearing (Trial Tr. 35).

The case which appellant cites to uphold his contention that the plaque was improperly admitted, is a rape-murder case wherein a pair of men's shorts with paint on them had been knowingly represented to the court as shorts with blood on them. *Miller* v. *Pate*, 386 U. S. 1 (1967).

The appellant attempts to compare the plaque in case at bar with the men's shorts in *Miller*. He does this by showing that the plaque is sometimes referred to as being constructed of plastic and sometimes of glass. *In no manner nor at any time is the nature of the four bills challenged.*

The plaque, regardless of what it was made of, was taken the day of the theft to the bank by a police officer. The bank official gave a receipt for the bills and designated the serial numbers (Plaintiff's exhibit No. 10). At the trial the bank official testified that the plaque shown to him at the trial contained the *currency* that had been left at the bank in safe keeping. The bank official also acknowledged the letter (receipt) designated as plaintiff's exhibit No. 10 (Trial Tr. 80).

Regardless of what the plaque was constructed of, it contained currency the day it was taken from the finance company. It contained the same currency when it was taken to the bank. It contained the same currency the day it was offered as evidence at the trial.

The facts of case at bar do not bring it under the rule of law in *Miller, supra.*

CONCLUSION

There was sufficient evidence properly admitted upon which the jury found that appellant was guilty of grand larceny as charged.

Respondent respectfully submits that the fact there were other charges being processed against appellant, the

fact time was required for sanity examination, the fact the calendar was crowded, the fact the court took time to consider certain motions made by appellant, and the fact defense counsel was appointed to be a prosecuting attorney, justified the court in granting continuances.

No prejudice has been shown.

Respectfully submitted,

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