1972

State of Utah v. Robert Norman Macri : Brief of Respondent

In The Supreme C
of the State of U

STATE OF UTAH,

Plaintiff-Respo

vs.

ROBERT NORMAN MACR

Defendant-A

BRIEF OF R

Appeal from the Judg
nile Court for Salt Lake Co
Honorable Paul C. Keller, J

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Attorn

ROBERT NORMAN MACRI
1218 Fourth Avenue
Salt Lake City, Utah 84103

Appellant, pro se

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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

vs.

ROBERT NORMAN MACRI,

Defendant-Appellant.

Case No. 12799

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant was convicted in the District Juvenile Court for Salt Lake County, State of Utah, of contributing to the delinquency of a minor, Utah Code Ann. § 55-10-80 (1953), as amended, before the Honorable Paul C. Keller, Judge, sitting without a jury. Appellant was sentenced to a term of three months in the county jail and fined the sum of $200.00 with the jail sentence to be suspended upon the condition that the fine would be paid within 60 days.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the lower court judgment and sentence.

STATEMENT OF FACTS

Beverly Smith, the minor's mother, testified that she discovered her daughter missing on the 8th of July, 1970 (R. 4); that her daughter was gone without her permission (R. 4); and that at no time had she given her daughter permission to stay at the appellant's residence (R. 5).

The minor daughter testified that she was 14 years old (R. 21) and that she left home without telling her mother how long she would be gone (R. 21). The minor stated that her mother gave her permission to leave for a while to visit a friend but that she (the minor) did not return home. (R. 22). The minor further testified that the night of July 8th she stayed in a public park; that on the night of July 9th, 11th and 14th she stayed in a van parked outside of the Alameda Street Church, which was operated and occupied by the appellant; and that on the nights of July 10th, 12th and 13th, she stayed inside the church. (R. 22).

While at the church the minor saw the appellant in the kitchen (R. 24) and on various other occassions between July 8th and July 15th (R. 24). Appellant never asked her if she lived in Salt Lake City; if she was staying away from home without her parents permission; never asked her how old she was or what she was doing; and never asked her to leave (R. 25). During cross examination the minor testified that remaining at the church assisted her in staying away from home as it afforded her a place to stay. (R. 32). The minor also testified that while she was at the Alameda Street Church

she was allowed to eat, cook and sleep there. (R. 26 et seq., 31, 25).

Officer John Malmborg testified that he talked with the appellant on the date of the minor's arrest (R. 54) and that the appellant, at that time, was on the porch at the entrance to the front door of the church. (R. 54, 56). Officer Malmborg inquired of the whereabouts of Mr. Charles Artman. Appellant stated that Mr. Artman was not present but that he (the appellant) was co-tenant and offered his assistance. (R. 56). After the appellant was informed by Officer Malmborg that he was looking for the minor girls the appellant acknowledged the girls' presence and stated that they were in a back room. (R. 64). In oral argument before the court, appellant's co-defendant made inferences to the effect that the appellant participated in and was a part of the operation of the Alameda Street Church. (R. 89 lines 10-18 et seq. and R. 91 lines 7-15).

Throughout the trial the appellant was represented by his own counsel, Mr. Richard L. Young. At the conclusion of the state's case Mr. Young and the appellant did not desire to put on any evidence or call any witnesses in appellant's behalf. (R. 93).

ARGUMENT

POINT I

UTAH CODE ANNOTATED SECTION 55-10-80 (1953), AS AMENDED, DOES NOT REQUIRE A SHOWING OF INTENT.

Even though Utah Code Annotated Section 76-1-20 (1953), as amended, requires that in every crime or public offense there must be a "union or joint operation of act and intent, or criminal negligence," it is clearly within the power of the legislature to make certain acts criminal without requiring intent. Such statutes are generally enacted in the area of laws which are intended to protect the public morals, health, peace and safety.

In *People v. Gory,* 28 Cal. 2d 450, 170 P.2d 433 (1946) the court stated:

> "So far as pertinent to defendant's argument, section 20 of the Penal Code provides that 'In every crime or public offense there must exist a union, or joint operation of act and intent***.' But this does not mean that a positive, willful intent to violate the law is an essential ingredient of every offense. Sometimes an act is expressly prohibited by statute, in which case the intentional doing of the act, regardless of good motive or ignorance of its criminal character constitutes the offense denounced by law. Instances illustrating this principle may be found in statutes enacted for the protection of public morals, public health, and the public peace and safety. [Citations omitted.] If a specific intent is not made an ingredient of the statutory offense it is not necessary to prove such specific intent in order to justify conviction." *Id.* at 435.

Appellant's cursory allegation that intent is required for a conviction under U.C.A. (1953) 55-10-80 (1953), as amended, is erroneous. "It is only where, from the language or effects of the penal law, a purpose to require the existence of such an intent can be discovered that such an intent need be shown." *People v. Sweeney,* 66 Cal. App. 2d 855, 153 P.2d 371 at 372 (1944).

U.C.A. § 55-10-80 does not require a showing of intent. When the legislature passed the statute, its purpose was not only to punish the wrongdoer, but also to protect youth from practices and persons who might impede their normal growth and development as young adults.

> ". . . [I]t must be noted that the statute under which defendant was charged does not require that the act be intentional or willful. It is within the power of the legislature to declare an act criminal, irrespective of the intent of the doer of the act. Whether intent is an essential element of a statutory crime depends upon the intent of the legislature." *State v. Winger* 41 Wash. 2d 229, 248 P.2d 555 at 557 (1952).

In *State v. Merrifield,* 180 Kan. 267, 303 P.2d 155 (1956), the Supreme Court of Kansas stated:

> "The legislature may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the

> doer, and where the legislative intention appears, it is incumbent upon the courts to give it effect, although the intent of the doer may have been innocent. The doing of an inhibited act constitutes the crime, and the moral turpitude or purity of motive by which it is prompted, and the knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt." *Id.* at 157.

In *Anderson v. State,* 384 P.2d 669 (Alaska 1963) the Alaska Supreme Court affirmed a conviction for contributing to the delinquency of a minor. The court rejected the defendant's contention that since the indictment charged a willful commission of the act, knowledge that the prosecutrix was under 18 was an essential element of the crime charged. The court noted that the word "willful" did not appear in the statute, and emphasized that the statute, which did not make specific intent an ingredient of the offense, eliminated the necessity for awareness of the specific wrongdoing.

When specific intent is not an ingredient of a statutory offense, it is not necessary to prove such intent to justify a conviction. (See *People v. Reznick,* 75 Cal. App. 2d 832, 171 P.2d 952 (1946).) Appellant's contention that a requirement of specific intent be read into the statute is without merit and should be rejected by this court.

POINT II

UTAH CODE ANNOTATED SECTION 55-10-80 (1953), AS AMENDED, IS NOT SO VAGUE OR INDEFINITE AS TO VIOLATE THE FOURTEENTH AMENDMENT.

The appellant contends by broad, conclusory statements, unsupported by any authority, that Utah Code Annotated Sec. 55-10-80 is so vague as to violate Fourteenth Amendment standards of due process. Appellant contends that this allegation is supported by this court's decision in *State v. Tritt,* 23 U.2d 365, 463 P.2d 806 (1970) and by the fact that the 1971 Utah State Legislature amended Section 55-10-77 Utah Code Ann. so as to remove runaways from the jurisdiction of the juvenile court.

Appellant's contentions are *non-sequitur.* Obviously, appellant is not charged with being a runaway. The charge, as contained in the complaint was:

> "That Robert Norman Macri, in violation of 55-10-80, U.C.A., as amended, aided and encouraged Robyn Ann Smith to become or remain a runaway by permitting and encouraging her to sleep and/or reside in a house which he is renting and occupying.
>
> The said acts on the part of the defendant having caused or did manifestly tend to cause the said child to become or remain delinquent." (R. 196).

The allegation contained in the complaint is set forth in specific terms and fully advised the appellant of what conduct he was charged with so as to adequately allow the appellant to prepare his defense thereof. Appellant's reference to Utah Code Ann. 55-10-77 is of little, if any, merit.

Utah Code Ann. Section 55-10-63 (1953) as amended, states that in order to effectuate the purposes of the Juvenile Court statutes, the statutes are to be liberally construed. The 1971 amendment of Utah Code Ann. 55-10-77, to which the appellant refers, substituted the word "who" for "whose," at the beginning of the statute and inserted the phrase "is beyond the control of his parent, guardian, or other lawful custodian to the point that his" before the phrase "behavior or condition" in subsection (2) (b) and deleted the phrase "or who has run away from his home or who is otherwise beyond the control of his parents, custodian, or school authorities" at the end of subsection (2) (c).

As originally constituted, the statute was redundant in stating "or who has run away from his home *or who is otherwise beyond the control of his parent.*" (Emphasis supplied.) Clearly, according to the original wording of the statute, a runaway was but one example of a juvenile who was "beyond the control of his parent." The 1971 amendment eliminated this repetitious wording and now states:

"(2) (b) who is beyond the control of his parent, guardian, or other lawful custodian. . . ."

The language of Section 55-10-77(2)(b) does not indicate that runaways are now beyond the jurisdiction of the juvenile courts. On the contrary, it is clear that the legislative intent is to include runaways as being one type of a juvenile "who is beyond the control of his parent," and therefore subject to the jurisdiction of the juvenile court.

Reiterating the obvious, appellant was charged with aiding Robyn Ann Smith to remain a runaway by permitting and encouraging her to sleep and/or reside in a house which he was renting and occupying. Utah Code Ann. 55-10-80 (1) provides that the Juvenile Court shall have jurisdiction over:

> "Any person eighteen years of age or over who induces, aids, or encourages a child to violate any federal, state, or local law or municipal ordinance, or who tends to cause children to become or remain delinquent, or who aids, contributes to, or becomes responsible for the neglect or delinquency of any child:"

The recent case of *State v. Tritt, supra,* contains important language for this court to consider in the case at bar. In *Tritt,* this court stated that even though the appellant did not specifically raise the question of the constitutionality of Utah Code Ann. 55-10-80(1), if he had raised the issue this court could not agree that the statute was invalid for being vague.

> "However, we further observe that even if those obstacles did not exist, and we could prop-

> erly consider the merits of the question, we could not agree that the statute is invalid. The foundational rules here are that all presumptions favor validity of the statute; and that it will not be declared unconstitutional unless found to be so beyond a reasonable doubt. *The terms 'delinquency' and 'contributing to the delinquency' as applied to minors has for many decades had such widespread usage as to give clear and understandable meaning that it denotes actions that will aid, encourage or involve children in conduct which is contrary to law, or which is so contrary to the generally accepted standards of decency and morality that its result will be substantially harmful to the mental, moral or physical well-being of the child. This connotation of those terms is sufficiently well known that persons of ordinary intelligence and judgment who desire to do so would have no difficulty in governing their conduct by the statute." Id.* at 369. (Emphasis supplied.)

Numerous other courts are in accord with the language of this court as set forth in *Tritt*, and have upheld statutes worded similarly to that of Utah Code Ann. 55-10-80 as being constitutional. In *Brockmueller v. State*, 86 *Ariz.* 82, 340 P.2d 992 (1950) the court stated:

> "The Arizona statutes prohibit only the causing or encouraging of acts which have the effect of injuring the morals, health or welfare

of a child. Such statutes have a long history of commonlaw interpretation which renders sufficiently clear and meaningful language which might otherwise be vague and uncertain." *Id.* at 994.

"Even in criminal statutes, the language adopted need not afford an interpretation approaching mathematical certainty. . . . We hold that the Arizona statutes are sufficiently certain and definite to apprise men of ordinary intelligence of the conduct which the statute prohibits." *Id.*

In *People v. Owens,* 13 Mich. App. 469, 164 N.W. 2d 712 (1968), the Michigan Court of Appeals upheld as constitutional a statute very similar to the wording of the Utah Statute. The court held that the statute under which the defendant was convicted was not so vague or indefinite that the defendant was denied his constitutional right to be informed of the standard of conduct required by him and to be appraised of the charges against him, and that the defendant who abetted a girl's departure from her home by promises of assistance *and by providing a place for her to stay,* served, contributed, and directed the girl towards delinquency.

Similarly, in *People v. Calkins,* 48 Cal. App.2d 33, 119 P.2d 142 (1941), the defendant was charged with contributing to the delinquency of a minor by assisting a young girl to remain away from home for a period

of several months. In affirmance of the defendant's conviction the court stated:

> "The main purpose of the Juvenile Court law is to prevent the delinquency of children. By this law acts or omissions which tend to cause minors to become delinquent are made criminal. It is the purpose of the statute to safeguard children from those influences which would tend to cause them to become delinquent. It is not necessary for the prosecutor to establish that defendant's acts or omissions resulted in the minor's actual entry upon the idle or immoral course of conduct. The prosecutor establishes his case when he proves acts or omissions on the part of the defendant which tend to cause or encourage the minor to lead an idle, dissolute, lewd or immoral life." *Id.* at 144.

In *Commonwealth v. Randall,* 183 Pa. Super. 603, cert. den. 355 U.S. 954, 133 A.2d 276, (1957), the defendants were found guilty of furnishing liquor to minors. The court held that the statute which provided that whoever, being of the age of 21 years and upwards, by an act corrupts or tends to corrupt the morals of any child under the age of eighteen years is guilty of a misdemeanor, was not so vague and indefinite that it violated the due process clause of the Fourteenth Amendment to the federal Constitution.

> ". . . . . (T)he common sense of the community, as well as the sense of decency, pro-

priety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it." *Id.* at 280.

"It is obvious that the mandates of the statute are salutary measures designed to protect children. 'The ways and means by which the venal mind may corrupt and debauch the youth of our land, both male and female, are so multitudinous that to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problems of juvenile delinquency. [Citations omitted]'." *Id.*

Similarly, the Kentucky Court of Appeals in *V. E. McDonald v. Commonwealth,* 331 S.W.2d 716 (1960), held that the statute proscribing contributing to the delinquency of a minor could not be deemed unconstitutional on the theory that it did not define with reasonable certainty the acts to be condemned, in view of the fact that the purpose and intent of the state were plain and evident from the general terms used therein.

"It is impossible to detail all of the acts which could conceivably fall within the condemnation of the statute as delinquencies or contributing to delinquency; hence, it was neces-

> sary to use general terms. The purpose and intent of the statute are plain and evident from the language used. The basis on which appellant contends that the statute is unconstitutional is not meritorious." *Id.* at 717.

The purposes of the Utah statute on contributing to the delinquency of a minor are clear. One is to protect minors not delinquent from any influence or condition that might encourage them toward delinquency and the second is to punish those who commit any acts *or omit the performance of any act, the effect of which is to cause a child to remain a delinquent.*

The prosecutor in the case at bar established his case when he showed that the apepllant participated in the operation and occupancy of the Alameda Street Church (R. 56, 89, 91, 24); knew of the presence of the minor child in the church (R. 64) and never asked her if she lived in Salt Lake City; if she was staying away from home without her parents permission; never asked her how old she was or what she was doing; and never asked her to leave. (R. 25).

The Utah statute on contributing to the delinquency of a minor is not so vague as to deprive the appellant his constitutional right of due process of law as guaranteed to him by the Fourteenth Amendment of the Constitution. The conviction and sentence of the appellant should be affirmed.

POINT III

APPELLANT WAS NOT PREJUDICED BY THE ALLEGED UNSWORN AND PREJUDICIAL COMMENTS OF OFFICER JOE GEE.

Appellant's allegation to the effect that Officer Joe Gee "intruded into court with unsworn and prejudicial comments" (see page 3 of Appellant's brief), is not borne out in fact nor by the record. Respondent only refers to appellant's allegation at this time because of its possible prejudicial effect.

At no place does it appear in the record that Officer Joe Gee ever entered into court with any "unsworn and prejudicial comments." At trial, the prosecutor brought the court's attention to the fact that there was an indication that appellant and his co-defendant had violated a restraining order previously issued by the court. (R. 109). Judge Keller effectively and summarily dealt with the matter stating that it should be dealt with separately at a later time.

> "Judge Keller: Let me clarify this without any further argument. Mr. Goodwill, Mr. Artman, please. I don't know how Judge Garff might have handled this and what his proposed procedure was, but if I am assigned to this case I'll agree with Mr. Young's contention that that is something that should be handled separately from any of the particular

trial on the merits of the Complaint herein and further that if you wish to bring that before the Court, there should be a citation issued advising the defendants that they are being cited with contempt of the Court's previous order and setting the matter upon the calendar to be heard upon the citation rather than bringing it up in this manner, Mr. Goodwill." (R. 110 lines 13-24).

Judge Keller further stated:

"Why don't you consult with Judge Garff and see if he wants that heard by me or wants to consider that separately because I deem it to be an entirely separate matter from this trial. Even though the order was made in conjunction with this arrest, I feel that getting into it at the same time before this other matter is entirely concluded with the same Judge could possibly be prejudicial and I'd rather not proceed that way." (R. 112 lines 4-10).

"So, why don't you consult with Judge Garff before we do definitely put it down and if I am to hear it, I want a specific citation alleging the alleged violation of the order, getting the specifics and so the defendants can have due notice as to what they are being, or what contempt is being claimed, and set it up entirely separate from this trial." (R. 112 lines 13-18).

Clearly no prejudice resulted to the appellant by the comments of the prosecutor. There was not a jury present to be influenced by the prosecutor's remarks. The comments of Judge Keller clearly reveal that the Judge gave no weight to the statements of the prosecutor and that he would not use such statements as a basis for his decision in the case at bar. The Judge properly informed the parties that if such allegations were to be made and considered it would have to be done in an entirely separate trial.

Neither the appellant nor his counsel specifically moved the court for a mis-trial (R. 109) and the appellant's brief is totally void of any showing that he was in any manner prejudiced by the prosecutor's statements. In *Jones v. Hogan* 351 P.2d 153 (1960) the Supreme Court of Washington held:

> "If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal." *Id.* at 156.

The alleged misconduct of Officer Joe Gee who, contrary to the allegation of appellant, did not appear in court, does not justify a new trial where, as in the instant case, there is no showing that the appellant suffered any prejudice and, there is an affirmative showing that the Judge took proper corrective measures al-

leviating any possibility of prejudice. For the purpose of this statement, the respondent does not admit that any prejudice occurred only that if some prejudice did occur it was corrected by the actions of the trial judge. (See *Ford Motor Company v. Arguello,* 382 P.2d 886, 892 (1963 Wyo.); *Betz v. Goff,* 5 Ariz. App. 404, 427 P.2d 538 (1967).)

POINT IV

THERE IS NO MATERIAL INCONSISTENCY IN THE TESTIMONY OF OFFICER MALMBORG AND ANY INFERENCE BY THE APPELLANT TO THE EFFECT THAT IT IS IMPROPER TO REFRESH A WITNESS'S MEMORY IS CONTRARY TO THE EXISTING RULES OF LAW.

Appellant's contention that the evidence is insufficient to sustain his conviction because of alleged inconsistencies in Officer Malmborg's testimony cannot be sustained. The main inconsistencies alluded to by the appellant pertain to the exact words that the appellant and Officer Malmborg exchanged when the Officer was preparing to arrest the minor girls. (R. 56, 62, 63, 64). The trial court manifestly believed the testimony of Officer Malmborg and whether or not the officer used the same words while testifying to the encounter with the appellant is irrelevant. The content of his testimony was consistent in all aspects.

The appellant was at the Alameda Street Church when Officer Malmborg arrived to make his arrest (R. 54, 56); the appellant stated that he was the co-tenant of the church and that he knew of the whereabouts of the girls (R. 56, 62, 63, 64). Consequently, the decision of the trial court adverse to the appellant is conclusive in this regard. At no time did the appellant deny or allege that any of the statements made by Officer Malmborg were not true nor did he in any other manner exhibit any evidence or testimony to the contrary.

The law is well established that in certain situations, for the purpose of enabling him to testify, a witness may be permitted to refresh his memory or stimulate his power of recollection by the use of written matter. A witness who has the means of aiding his mory by a recourse to memoranda or papers may be required to look at such papers in order to enable him to ascertain a fact with precision, to verify a date or to give more exact testimony than he otherwise could as to times, number, quantities and the like. (See 98 C.J.S. *Witnesses* Sec. 357; *State v. Carter,* 1 Ariz. App. 57, 399 P.2d 191 (1965).)

The trial court and the prosecutor made it clear, after discussion between the court and counsel for both sides, that Officer Malmborg was to answer questions asked of him if he could answer them (R. 54). If the officer's answer was "I don't remember." the prosecutor would then ask him to look at his memoranda to refresh his memory — at which time the memoranda

would be made available for examination by the appellant and his counsel. Prior to the establishment of this procedure Officer Malmborg had responded to only four questions. (R. 51, 52). Thereafter no objection was made to any questions asked the witness. In fact the record clearly reveals that after the first four questions had been asked and answered it was not necessary for the witness to again refer to his memoranda for the purpose of refreshing his memory. The appellant suffered no prejudice by allowing the witness to respond to four questions prior to the establishment of a procedure by which the witness could refresh his memory. The conviction and sentence of the appellant should be affirmed.

CONCLUSION

The meager arguments contained in appellant's brief clearly show that there was no error or reason that the trial court's decision should be overturned.

> "We believe that an appellant has a particular obligation to adequately prepare his case so as to be of assistance to this court. That was not done in this case. We consider this an appropriate occasion to remind counsel that the presentation of cases without adequate preparation discredits the bar and obstructs the administration of justice." *Veal v. Newlin,* 367 P.2d 155 at 157 (1961 Alaska).

The conduct of appellant constitutes contributing to the delinquency of a minor in that acts or omissions by the appellant aided the minor child to remain a runaway. The conviction and sentence of the lower court should be affirmed.

Respectfully submitted,

VERNON B. ROMNEY
Attorney General

DAVID S. YOUNG
Chief Assistant Attorney General

Attorneys for Respondent