

1994

The State of Utah v. Bruce Labeau : Brief of Appellant

Utah Court of Appeals

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Jan Graham; Attorney General; Attorney for Respondent.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)
)
 Plaintiff-Respondent,)
)
) Case No. 940231-CA
)
 BRUCE LABEAU,) Classification Priority 2
)
 Defendant-Appellant.)

AMENDED BRIEF OF APPELLANT ACCOMPANY MOTION
FOR LEAVE TO WITHDRAW AS COUNSEL

Appeal from Judgment and Order entered February 23, 1994
in the Fifth District Court for Iron County, State of Utah, the
Honorable Robert T. Braithwaite Presiding.

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,)
)
 Plaintiff-Respondent,)
)
 vs.) Case No. 940231-CA
)
 BRUCE LABEAU,) Classification Priority 2
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 Defendant-Appellant.)

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)
 Plaintiff-Respondent,)
) Case No. 940231-CA
 vs.)
)
 BRUCE LABEAU,)
)
 Defendant-Appellant.)

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of the Court of Appeals is established by 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence, and Commitment from the Fifth District Court for Iron County following a conviction of Possession of a Dangerous Weapon, a Third-Degree Felony.

ISSUES PRESENTED ON APPEAL

This appeal is prosecuted under the specific requests of the Defendant after his counsel, the author of this Brief has instructed the Defendant-Appellant that, in his opinion, the case does not contain sufficient cause to prosecute an appeal. However, the undersigned has been instructed by his client to pursue the appeal. Under these circumstances, the undersigned is submitting an "Anders" brief. Anders v. California, 386 U.S. 738 (1967). The potential issues for review of the court are the fact that two of

the empaneled jurors were challenged for cause because of their employment or other relationship with law enforcement authorities of the State of Utah and for failure to dismiss the information at the conclusion of the State's case because "dangerous weapon" was adequately defined in the statute.

DETERMINATIVE STATUTES OR RULES

The statute which is believed to be determinative in this matter are Sections 76-8-311.3 and 76-1-601, Utah Code Annotated, 1953, as amended. These statutes are reproduced in total in the Addendum to this brief.

NATURE OF THE CASE

This is an appeal from the Judgment, Sentence and Commitment for the offense of Possession of a Dangerous Weapon, a Third-Degree Felony from the Fifth District Court of Iron County.

COURSE OF THE PROCEEDINGS

Defendant was originally charged with Possession of a Dangerous Weapon and Possession of a Spirituous or Fermented Liquid by a Prisoner. The latter charge was dismissed before trial, but the remaining charge went to trial before a jury on February 17, 1994. At the conclusion of the State's case, Defendant moved for dismissal on the grounds that dangerous weapon was not adequately defined under Section 76-8-311.3, Utah Code Annotated, 1953, as amended. The court denied the motion and at the conclusion of all of the evidence, the jury rendered a verdict of guilty against Defendant.

DISPOSITION AT TRIAL COURT

At the trial court the Defendant was convicted of Possession of a Dangerous Weapon, a Third-Degree Felony, and sentenced to zero to five years of incarceration at the Utah State Prison to be served following a present sentence that he is serving.

STATEMENT OF FACTS

During the course of jury selection, one potential juror stated that she was an employee of the State of Utah, Department of Youth Corrections. Similarly, another potential juror stated that her daughter was an Assistant Attorney General for the State of Utah. Defendant challenged both jurors for cause, but the lower court denied the challenge. Nevertheless, the State executed two of its own peremptory challenges to cause both potential jurors to be excluded. (Tr. 65-66).

At the conclusion of the plaintiff's case, Defendant made a motion to dismiss on the grounds that Section 76-8-311.3, does not have a definition of "dangerous weapon". The evidence that developed to that point showed that Defendant was allegedly in possession of a "shank" which appeared to be an approximately four-inch long cylindrical piece of metal that had been partially sharpened. The lower court denied the motion on the ground that "dangerous weapon" was adequately defined under Section 76-1-601(5) of the Utah Code. (Tr. 135).

SUMMARY OF ARGUMENT

It is believed that Defendant would contend that the two jurors should have been excused for cause because of their

relationship to law enforcement personnel.

Also, Defendant would contest the constitutionality of Title 76, Chapter 8, Section 311.3 on the grounds that it does not properly define a dangerous weapon and is, therefore, void for vagueness.

ARGUMENT

POINT I

APPELLANT CONTENDS THAT THE COURT IMPROPERLY FAILED TO EXCUSE THE TWO JURORS FOR CAUSE

Defendant would argue that the two jurors that he asked to be excused for cause should have been excused by the court pursuant to Rule 18 of the Utah Rules of Criminal Procedure. Specifically, Defendant would claim that one of the jurors was an employee of a correction agency of the State of Utah and that the other juror was a parent of an Assistant Attorney General, which is a prosecutorial agency.

Counsel for Defendant believes that the above argument is flawed because even if the court improperly failed to remove the questioned jurors for cause, they were removed, in any event, by the State's peremptory challenges. Accordingly, the error, if any, was harmless error. Utah R. Crim. P. 30(a). See State v. Featherson, 71 P.2d 424 (Utah 1989); State v. Johnson, 771 P.2d 1071 (Utah 1989).

Since both jurors were excused through peremptory challenges, and Defendant did not have to use his own peremptory challenges to accomplish the same, the outcome obviously would have

been no different had the court excused the jurors for cause. Indeed, had the court excused the jurors for cause, the State could have used two of its peremptory challenges on other jurors that may have been more favorable to Defendant.

POINT II

APPELLANT CONTENDS THAT HE WAS DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE STATUTE UNDER WHICH HE WAS CONVICTED WAS UNCONSTITUTIONALLY VAGUE

Defendant would argue to the court that the definition of "dangerous weapon" is not stated in Section 76-8-311.3, Utah Code Annotated, 1953, as amended, and therefore, whether he has committed an offense is ambiguous and unconstitutionally vague.

There is no definition of "dangerous weapon" in the statute under which Defendant has been charged. Accordingly, Defendant would argue that it would be impossible for him to ascertain whether the production of the "shank" and his possession of it would be a criminal offenses under the law. Therefore, he would argue that the Information against him should have been dismissed.

Counsel believes that even though "dangerous weapon" is not defined under the statute for which Defendant has been charged, it has been clearly defined under Section 76-1-601(5) of the Utah Code. That Section states that the definition applies throughout the criminal code. Utah Code Ann. Section 76-1-601 (1992). The "shank" would easily be determined by reasonable jurors as "capable of causing death or serious bodily injury" and that Defendant's "intended use of the item leads the victim to reasonably believe

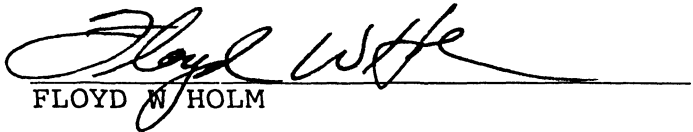
the item is likely to cause death or serious bodily injury". Serious bodily injury is also clearly defined under Section 76-1-601. Id., Subsection (10).

It is difficult to conceive of a purpose for a "shank" within a prison population that would not contemplate causing "serious bodily injury". Accordingly, it would have been reasonable for the jury, having the definitions of "dangerous weapon" and "serious bodily injury", to conclude that the "shank" was a dangerous weapon under the statute under which Defendant was charged. Moreover, it is patently reasonable to presume that Defendant, being charged with the definitions of "dangerous weapon" and "serious bodily injury" would likewise know that the "shank" was a dangerous weapon within the contemplation of 76-8-311.3. Therefore, any claim of "void for vagueness" is, at best, frivolous.

CONCLUSION

Defendant respectfully requests the court to consider the issues he believes to be relevant and award such relief as it deems appropriate.


DATED this 30th day of September, 1994.


FLOYD N. HOLM

MAILING CERTIFICATE

I hereby certify that I mailed a two (2) true and correct copies of the above and foregoing BRIEF OF APPELLANT to Ms. Jan

Graham, Utah Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, and to Bruce LaBeau, P.O. Box 550, Gunnison, UT 84634, this 30th day of September, 1994, first class postage fully prepaid.


FLOYD W HOLM

A D D E N D U M

76-8-311.3. Items prohibited in correctional facilities — Penalties.

(1) As used in this section:

(a) "Controlled substance" means any substance defined as a controlled substance under Title 58, Chapter 37, Utah Controlled Substances Act.

(b) "Correctional facility" means:

(i) any facility operated by the Department of Corrections to house offenders in either a secure or nonsecure setting;

(ii) any facility operated by a municipality or a county to house or detain criminal offenders; and

(iii) any building or grounds appurtenant to the facility or lands granted to the state, municipality, or county for use as a correctional facility.

(c) "Offender" means a person confined at a correctional facility.

(d) "Medicine" means any prescription drug as defined in Title 58, Chapter 17, Pharmacy Practice Act, but does not include any controlled substances as defined in Title 58, Chapter 37, Utah Controlled Substances Act.

(2) Except as provided by correctional facility policy or rule, no firearm, ammunition, dangerous weapon, implement of escape, explosive, controlled substance, spirituous or fermented liquor, medicine, or poison in any quantity may be:

(a) transported to or upon a correctional facility;

(b) sold or given away at any correctional facility; or

(c) given to or used by any offender at a correctional facility.

(3) It is a defense to any prosecution under this section if the accused in committing the act made criminal hereby:

(a) with respect to a correctional facility operated by the Department of Corrections, acted in conformity with departmental rule or policy;

(b) with respect to a correctional facility operated by a municipality, acted in conformity with the policy of the municipality; or

(c) with respect to a correctional facility operated by a county, acted in conformity with the policy of the county.

(4) (a) Any person who transports to or upon a correctional facility any firearm, ammunition, dangerous weapon, explosive, or implement of escape with intent to provide or sell it to any offender, is guilty of a second degree felony.

(b) Any person who provides or sells to any offender at a correctional facility any firearm, ammunition, dangerous weapon, explosive, or

implement of escape is guilty of a second degree felony.

(c) Any offender who possesses at a correctional facility any firearm, ammunition, dangerous weapon, explosive, or implement of escape is guilty of a second degree felony.

(d) Any person who, without the permission of the authority operating the correctional facility, knowingly possesses at a correctional facility any firearm, ammunition, dangerous weapon, implement of escape, or explosive is guilty of a third degree felony.

(5) (a) Any person is guilty of a third degree felony who, without the permission of the authority operating the correctional facility, knowingly transports to or upon a correctional facility any:

(i) spirituous or fermented liquor;

(ii) medicine, whether or not lawfully prescribed for the offender; or

(iii) poison in any quantity.

(b) Any person is guilty of a third degree felony who knowingly violates correctional facility policy or rule by providing or selling to any offender at a correctional facility any:

(i) spirituous or fermented liquor;

(ii) medicine, whether or not lawfully prescribed for the offender; or

(iii) poison in any quantity.

(c) Any offender is guilty of a third degree felony who, in violation of correctional facility policy or rule, possesses at a correctional facility any:

(i) spirituous or fermented liquor;

(ii) medicine, other than medicine provided by the facility's health care providers in compliance with facility policy; or

(iii) poison in any quantity.

(d) Any person is guilty of a class A misdemeanor who, without the permission of the authority operating the correctional facility, fails to declare or knowingly possesses at a correctional facility any:

(i) spirituous or fermented liquor;

(ii) medicine; or

(iii) poison in any quantity.

(6) The possession, distribution, or use of a controlled substance at a correctional facility shall be prosecuted in accordance with Title 58, Chapter 37, Utah Controlled Substances Act.

PART 6
DEFINITIONS

76-1-601. Definitions.

Unless otherwise provided, the following terms apply to this title:

(1) "Act" means a voluntary bodily movement and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(4) "Conduct" means an act or omission.

(5) "Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:

(a) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

(6) "Offense" means a violation of any penal statute of this state

(7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting

(8) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(9) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(10) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.