

1994

West Valley City v. Lynn Poulsen : Reply Brief

Utah Court of Appeals

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Lynn Poulsen; Pro Se Appellant/ Defendant.

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BRIEF

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DOCKET NO. 940507-CA

IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

Plaintiff/Appellee,

vs.

LYNN POULSEN,

Defendant/Appellant.

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Case No. 940507-CA

Priority 2

REPLY BRIEF OF APPELLANT

Appeal from the Third Circuit Court, West Valley Department
in and for Salt Lake County, State of Utah;
the Honorable William B. Bohling

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FILED

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3. Santanello v. Cooper, 475 P.2d. 246 at 250 (1970).
4. State v. Anderson, 718 P.2d. at 403 (Utah 1986).
5. State v. Garteiz, 688 P.2d. 487 (Utah 1989).
6. State v. Johnson, 663 P.2d. 48 (1983).
7. State v. Peters, 798 P.2d. 780 (Ut. App. 1990).
8. State v. Strieby, 790 P.2d. 98 at 101 (Ut. App. 1990).
9. State v. Troy, 688 P.2d. at 486.
10. State v. Valdez, 513 P.2d. 422 (1973).
11. Terry v. Zions Coop Mercantile Inst., 605 P.2d. 314 (Utah 1979).
12. United States v. Caro, 637 F.2d. 869 (2nd Cir. 1981).

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Priority 2

REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING POULSEN'S MOTION TO DISMISS AT THE CLOSE OF THE CITY'S CASE-IN-CHIEF.

Appellee's brief in Detail of the Argument I misstates the evidence from the transcript of the trial, or takes the testimony out of context in the following manner.

Paragraph #5. Under cross examination, Larsen admits that he only asked Poulsen once who the owner of the horses was and that he chose not to believe Poulsen or check out the information (T. at 66). Also in paragraph #5, it was not Poulsen who originally informed the West Valley City officers that one horse was blind and would kick. This was apparent to the first deputies on the scene and told by them to officer Cox (T. at 17 and 28). Having a knowledge of a pasture area is irrelevant as Larsen also testified he did not know where the animals had escaped from (T. at 69).

Paragraph #6 establishes that Poulsen's daughter, believed to be of legal adult age, had familiarity with some of the horses in the pasture. The evidence must be against Poulsen and her conduct as the law does not allow for conviction by reason of association.

Paragraph #7 is nothing more than hearsay testimony that Poulsen had no opportunity to confront or cross examine. The City misstates to this Court that this hearsay conversation was confirmed by Prisbrey¹. It is uncontroverted that none of the officers knew who the owner of these horses was when asked directly under oath (T. at 28, 64, 65, 68, 74, 77 and 102). Not one of the City's witnesses would testify under oath that they believed Poulsen owned the horses.

Paragraph #7 also erroneously states that the City's ordinance is a strict liability offense for which no "mental element" need be proven. This will be addressed in Point II and Point IV of Poulsen's Reply Brief.

POINT II

WEST VALLEY'S ORDINANCE IS UNCONSTITUTIONAL AS APPLIED TO POULSEN.

Again Appellee misstates to this Court that the testimony of Prisbrey concerning Poulsen's alleged ownership of the horses was "completely uncontroverted." Prisbrey also states under oath he does not know who the owner of the horses was at the time, nor had he ever looked for an owner (T. at 102). If the officers believed Poulsen owned the horses beyond a reasonable doubt, they would have testified under oath and the City would have placed Poulsen

¹ It should be noted by this Court that Appellee's Brief states that testimony given concerning Poulsen's alleged ownership of the horses was never "rebutted or challenged" when it was the City's own witnesses who did not believe Poulsen owned the horses up to the day of trial. Neither did the City cite Poulsen as the owner of the animals in the jury instruction (see Appellant's Brief Exhibit of Jury Instruction, No. 15).

as owner in the Jury Instructions.

The facts of this case against Poulsen and Poulsen's conduct is complete and consistent with innocent behavior as follows:

-- Poulsen states she is not the owner but knows who the owner is.

-- Poulsen's knowledge that one horse kicked and another horse was blind was first noticed by Salt Lake County Deputies prior to any involvement with Poulsen.

-- Poulsen warned the officers it was dangerous to go into a pasture area.

-- The City failed to prove that Poulsen had any legal responsibility or duty to prevent the horses' escape, therefore, Poulsen did not "allow" the horses to run at large within the meaning of the ordinance (T. at 169).

The above conduct pointed out in Appellee's Brief against Poulsen is entirely consistent with innocent behavior.

POINT III

TRIAL COURT ERRED IN DENYING POULSEN'S MOTION FOR A NEW TRIAL BECAUSE OF PREJUDICIAL AND UNFAIR TACTICS BY THE CITY'S PROSECUTOR.

First, Poulsen objects to the use of an uncertified transcript being used as reference in support or controversy of Appellee's case. Poulsen requested a stipulation from opposing counsel prior to her Notice of Appeal and pursuant to U.R.A.P. rule 11(e)(1) to use said personal transcription for her appeal. This request was denied by the Appellee for the reason of reliability of transcription who now wish to use the transcription to support their contentions. (See Appellee's Memorandum #4 and 4, case no. 940727-CA.) Poulsen's position is that this Court should strike Appellee's response to Point III and treat on appeal as if Appellee

had refused or failed to respond.

Should this Court deny Poulsen's request to strike, Poulsen replies as follows:

The Appellee justifies the prosecutor's improper remarks by misstating a colloquy between the parties and the Court prior to the empaneling of the jury. Poulsen's contention to the Court in the pages attached as the City's exhibit clearly show that Poulsen wanted the issue of her arrest by a "pound keeper ... outside of their city" and whether it was a false arrest to go before the jury. Poulsen states the following at R. 291:

"I haven't been charged with either one of those (*referring to crimes of not cooperating with a police officer or failing to have identification*). I would like the determination as to the validity of the arrest that was made and if it was proper and pursuant to the fact that under the reasonable suspicion statute, it states an officer may ask for your name, address and an explanation."

Again Poulsen is requesting a determination if there was a false arrest made on her person (R. at 292). Poulsen then tries to clarify that her motion in limine is for a ruling by the Court that Poulsen was not required by any state authority to give her date of birth.

Court: "You made a motion for in limine ..."

Poulsen: "Simply on the fact that a refusal to get [sic] a birth date is not required by any ordinance or a statute ... required under the law ... that was all." (R. at 293)

Again Poulsen clarifies it is a date of birth issue and not driver's license issue as follows:

Poulsen: "Your Honor, all I ask was that the fact that my

birthrate [sic] that I refused to give my birthrate [sic] to the officers because it was religious belief ..." (R. at 294)

The City replies that they will mention that Poulsen was arrested to the jury (R. at 294). Nowhere is the issue of the driver's license status of Poulsen stipulated to or even mentioned. The Court also states that the ruling on relevancy will be made at the time either party objected.

Court: "What you can raise is your defense subject to the objections of Mr. Stoney, the prosecutor, just as if you can object to his case and I will rule under relevancy at the time." (R. at 295)

The City misrepresents to this Court that Poulsen did not object to testimony concerning her arrest and driver's license status until it appeared to be damaging (App. Br. at pg. 14). The transcript of the trial shows clearly that the first mention of the driver's license issue was objected to by Poulsen on the grounds of irrelevancy, as per prior court statement (T. at 46). The Trial Court improperly overruled Poulsen's objection and disregarded Utah Rules of Evidence, rule 404(b). The City's only reason to bring to the jury's attention this fact was "to provoke an instinct to punish or to have the jury decide the case on something other than the facts relevant to the case." Terry v. Zions Coop Mercantile Inst., 605 P.2d. 314 (Utah 1979).

The City then states that the City's raising of this issue was raised by Poulsen in her opening statement (App. Br. at pg. 15). However, any effect that may have had on the jury was corrected by the City's insistence of a curative instruction by the Trial Court (T. at 12, 13 and 14). Utah courts have long regarded the use of curative instructions. State v. Peters, 798 P.2d. 780 (Ut. App. 1990). The City's prosecutor questions and remarks throughout the course of the trial was cumulatively harmful and prejudicial to Poulsen. It called to the jury's attention

that Poulsen may have been driving a car without a license and had nothing to do with animals at large charges. The prosecutor's reference to Poulsen's driver's license status was totally unnecessary and served no valid purpose beside being completely irrelevant. These remarks fit squarely in the parameters of the Valdez test of prosecutorial misconduct. State v. Valdez, 513 P.2d. 422 (1973); State v. Johnson, 663 P.2d. 48 (1983); and State v. Garteiz, 688 P.2d. 487 (Utah 1989).

The City misrepresents again to the Court the facts surrounding Poulsen's arrest. Poulsen gave the officers a phone number which the officers could have verified who it was listed to as well as verifying the addresses Poulsen gave them. The officers admitted they had the ability to verify this information but chose not to (T. at 58, 59 and 97).

The officers failed to even interview all witnesses on the scene concerning Poulsen's explanation of events, through Poulsen's daughter, Appellee's Brief goes into great detail concerning the issue of Poulsen not having a driver's license. This has been addressed. The issue of Poulsen's driver's license status was not even mentioned in the purported stipulation made prior to the trial (T. at 73, 74, 75, 76, 116 and 117).

The Appellee's Brief further misstates to this Court that Poulsen failed to object to this testimony at trial. This can only be construed by this Court to be made in bad faith and is clearly against the evidence as cited in Poulsen's opening brief pages 17-19 (T. at 46, 49, 50 and 110).

"When the evidence in the record is circumstantial or sufficiently conflicts, jurors are more likely influenced by an improper argument. ...[T]hey are more susceptible to the suggestion that factors other than the evidence before them should determine a defendant's guilt or innocence." State v. Anderson, 718 P.2d. at 403 (Utah 1986).

The evidence presented at trial is contradictory and at best circumstantial and this Court should "more closely scrutinize the prosecutor's conduct" and its cumulative prejudicial effect. State v. Troy, 688 P.2d. at 486.

The mention of Poulsen's silence as to her driver's license status was improperly admitted by the Trial Court during the City's case-in-chief and against well settled law. United States v. Caro, 637 F.2d. 869 (2nd Cir. 1981).

POINT IV

THE APPLICATION OF STRICT LIABILITY IN THE JURY INSTRUCTIONS TO POULSEN DIDN'T ACCURATELY REFLECT THE LAW.

The City's implication that use of the words "allow" and "responsibility" in their ordinance negates all requirements for a "mental element" (App. Br. at 11). However, applying strict liability standard was an inaccurate statement of the law of Utah. In Hornsby v. Corp. of the Presiding Bishop, 758 P.2d. 929 (Ut. App. Ct. 1988) the Utah Supreme Court adopted the definition of the word "allow" as stated in Santanello v. Cooper, 475 P.2d. 246 at 250 which states:

"The word "allow" means to approve of, to sanction, to permit, to acknowledge,. Webster's third International, unabridged (1961 ed.). So defined "allow" requires some degree of knowledge either actual or constructive on the part of the dog owner that his dog is at large; therefore, its use in the ordinance negates any intention to create strict liability for violation of the ordinance."

This argument also goes to the heart of Poulsen's contention that the ordinance was unconstitutionally applied to Poulsen.

Also the "term[s] run at large" in relation to domestic animals does not normally mean that an animal is found on property of neighbor is an isolated instance and means a more

generalized wandering or running of animals. People v. Christo, 19 N.Y. 2d. 678 (Ct. of App. 1967).

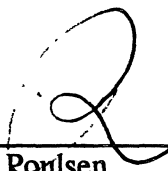
The application of strict liability and the City's admission that they had failed to prove that Poulsen had any legal duty or responsibility to prevent the escape of the horses is contrary to well founded in both criminal and tort law (T. at 169).

CONCLUSION

At the close of the City's case-in-chief there had been no evidence, direct or otherwise, to prove that Poulsen "allowed" the horses to escape or that Poulsen had any "responsibility" to contain the horses. The City failed to meet its burden of proof. "Court may not make speculative leap[s] across ... remaining gap[s] in the evidence ... Every element of the crime charged must be proved beyond reasonable doubt" or the verdict must fail." State v. Strieby, 790 P.2d. 98 at 101 (Ut. App. 1990).

The Appellant moves the Court of Appeals to reverse and vacate Poulsen's convictions and erroneous judgment for the reasons as set forth in case law and state authorities.

Dated this 30th day of August, 1996.



Lynn Poulsen
Defendant/Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of August 1996, I did notify by first class mail that the foregoing **Reply Brief of Appellant** was lodged with the Utah Court of Appeals.



ADDENDUM

ADDENDUM

CONSTITUTIONAL PROVISIONS

Utah Agricultural Code, § 4-25-5

Report of estrays -- Possession -- Relief from liability.

(1) Any person, other than an official of the county or of an animal control office under contract with the county, who finds an estray shall report such fact to the county or animal control office immediately. The county or the animal control office upon receipt of notification shall either take possession of the estray or, if deemed appropriate, authorize the person in possession of the estray to maintain and care for it pending determination and location of its owner.

Constitution of Utah, Art. I Sec. 12

[Rights of accused persons.] In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself, a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Rules of Evidence, Rule 608

Evidence of character and conduct of witness.

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitation;

(1) the evidence may refer only to character for truthfulness or untruthfulness, and

(2) evidence of truthful character is admissible only after the

character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Utah Rules of Evidence, Rule 404

Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, identify, or absence of mistake or accident. (Amended effective October 1, 1992.)

Utah Code of Criminal Procedure, § 77-7-15

Authority of peace officer to stop and question suspect -- Grounds. A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his action.

Criminal Code, § 76-1-501

Presumption of innocence -- "Element of the offense" defined.

(1) A defendant in a criminal proceeding is presumed to be innocent until each element of the offense charged against him is proved beyond a reasonable doubt. In absence of such proof, the defendant shall be acquitted.

(2) As used in this part the words "element of the offense" means:

(a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense;

(b) The culpable mental state required.

EXHIBIT

ORIGINAL

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,

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v.

LYNN POULSEN,

Defendant/Appellant.

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: MEMORANDUM OF POINTS AND
: AUTHORITIES IN SUPPORT OF
: SUMMARY DISPOSITION

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: Case No. 940727-CA
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Appellee West Valley City, by and through its counsel of record, Paul T. Morris and J. Richard Catten, hereby submits this Memorandum of Points and Authorities in Support of the Court's *Sua Sponte* Motion for Summary Disposition.

STATEMENT OF FACTS

1. Poulsen was convicted, by jury, of four counts of "Animals Running at Large."
2. Following her conviction, Poulsen filed an appeal as Case No. 940507-CA.

3. On August 19, 1994, Poulsen requested by letter that West Valley City allow the preparation of transcripts by someone other than a certified court reporter.

4. By letter dated August 31, 1994, West Valley City declined to stipulate to the preparation of transcripts by someone other than a certified court reporter.

5. On September 8, 1994, Poulsen filed a Motion for Payment of Transcripts.

6. This appeal, Case No. 940727-CA, was filed following the trial court's November 4, 1994, denial of Poulsen's Motion for Payment of Transcripts.

ARGUMENT

Poulsen's appeal of the denial of her Motion for Payment of Transcripts can be summarily dismissed on two separate grounds. Both of these grounds are set forth in Judge Bohling's Order on Disposition of Defendant's Motion for Payment of Transcripts of Court Proceedings for Appeal, a copy of which is attached hereto as Exhibit A.

First, Poulsen did not prepare an agreed statement of the facts as required in the trial court's previous order and in the former Rule 11, Utah Rules of Appellate Procedure¹. Also, Poulsen failed to explain why an agreed statement of the record would not be sufficient. *City of Murray v. Robinson* established these actions as being a minimum requirement necessary for the appellate court to make a ruling. *City of Murray v. Robinson*, 878 P.2d 1151 (Utah 1994).

¹ Rule 11 was amended April 1, 1995