

1995

Kim G. Curtis v. State of Utah : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

Case No. 950174-CA
Priority (2)

UTAH
DOCKET NO. 950174

IN THE UTAH COURT OF APPEALS
Summer Term, 1995

ON APPEAL

KIM G. CURTIS
Appellant

vs.

STATE OF UTAH
Respondent

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STATE OF UTAH
Plaintiff

Criminal No. 941800038FS

vs.

Judge John R. Anderson
KIM G. CURTIS
Defendant

On Appeal from Duchesne County, Duchesne Department,
State of Utah

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COURT OF APPEALS

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I. Although the transcript from the hearing on the motion to suppress was not included in the record on appeal, the issue of the warrantless stop was sufficiently argued during the trial as to make the lack of the transcript nonessential to the appellate court's determination of the trial court's error in allowing the evidence to be presented at trial.

Appellant's motion to suppress the evidence obtained from the warrantless search alleged performed incident to a traffic stop adequately set forth the arguments presented at the motion to suppress hearing, with the ruling by the court obvious in the fact that the evidence was allowed to be presented at trial. (Transcript pgs. 81-86) All that is lacking is a Motion in Opposition to the Motion to Suppress from the State, which the State never prepared or submitted to the trial court.

The argument presented at trial by the State provides this Court with an adequate representation of what the testimony was during the hearing on the Motion to Suppress. The State presented testimony as to the intensive search conducted by the police for the vehicle in which Appellant was a passenger and testimony that indicates that it was based on a tip from a confidential informant, rather than a traffic stop. (Transcript pgs. 81-85, 93-96, 124-26) This testimony adequately demonstrates that the stop itself was questionable and that the resulting search of the Appellant's person and the interior of the car should therefore have been performed subject to a warrant, rather than pursuant to a traffic stop. The officers performing the stop had no reason to suspect the presence of drugs in the vehicle absent the tip from the confidential informant, yet they were allowed to perform a warrantless search supposedly under the auspices of a traffic stop.

There was also adequate testimony and argument at trial concerning the possibility of the officer conducting a “plain-view” search of Appellant’s person. (Transcript pgs. 130-32, 306-09) The transcript reflects that during a demonstration of the circumstances the officer most probably faced the night of the search, it was at the very least difficult for the officer to see anything on Appellant’s person that would could have been considered incriminating enough to justify the warrantless search. The evidence showed that the bottle and baggie inside a pocket of the vest worn inside another coat was likely not visible at all. (Transcript pgs. 306-309)

There seems to be enough evidence before this Court in the record on appeal for the Court to make a ruling as to the error or lack thereof committed by the trial court without the need for the transcript from the motion to suppress hearing. Therefore, the lack of the inclusion of the transcript in question in the record on appeal would not be prejudicial.

II. Although the transcript for the motion to suppress hearing was not included in the transcript for the record on appeal, the issue of the lack of a knowing, voluntary waiver of his Miranda rights by Appellant due to his being under the influence of Valium and alcohol was adequately raised and argued at trial to allow this Court to make a determination as to the trial court’s error or lack thereof in allowing the “confession” to be introduced at trial.

The argument above concerning the lack of a transcript also applies to this section. Appellant’s memorandum of point and authorities accompanying the motion to suppress, as well as the argument presented at trial clearly set forth the arguments heard at the suppression hearing, again with the State failing to prepare and file a motion in opposition.

The testimony introduced at trial from Appellant demonstrates his lack of full and rational understanding and comprehension during the night in question and also his consumption of alcohol and Valium. (Transcript pgs. 305-06) Further, the amount of Valium consumed by

defendant was substantiated by Modesto Pacheo at the trial and not at the suppression hearing.
(Transcript pgs 238-41)

In furtherance of his argument, his behavior that evening, testified to by Officer Hooley and Officer Hendricks, would be consistent with the standard influence such substances have on the average person. (Transcript pgs. 101-02, 136-38) Appellant was calm, mellow, overly cooperative despite being in a highly stressful situation. Nor does his behavior in gathering up all the drugs to himself demonstrate the thinking of a rational individual.

III. Although the issue of double jeopardy is being raised for the first time on appeal, the Court should rule on the issue since it is an issue of first impression in the Utah courts, making it therefore an exceptional circumstance since the issue is incapable of being appealed under a claim of plain error.

The issue of double jeopardy, as it pertains to a prosecution for both possession of a controlled substance and failure to pay the tax under the Utah Illegal Drug Stamp Tax Act, has never been ruled on in the Utah courts and therefore there is no basis for alleging “plain error” in the trial court’s ruling since there is no precedent with which the ruling can conflict. Therefore, while Appellant failed to allege “plain error” on the issue of double jeopardy, it would have been difficult to do so since this is an issue of first impression. A court faced with this issue, having never been decided by another court in Utah, would have no way of knowing what an erroneous ruling on the issue would be.

To be able to allege “plain error” on the part of the trial court, there are two requirements that must be met. These requirements are set forth in State v. Eldredge, 773 P.2d 29 (Utah), *cert. denied*, 110 S.Ct. 62 (1989). The first requirement is that the error be plain, i.e., should have been obvious to the trial court that it was committing error. Id. at 354. The second requirement

is that the error affect the substantial rights of the accused, i.e., harmful. Id. The second requirement is easily met since Appellant was exposed to severe fines and penalties under the Stamp Act due to the trial court's interpretation of the statute's provision concerning impure and diluted substances. The first requirement is not so easily met since it cannot be obvious to the trial court that it was committing error since there has never been a ruling with which the trial court in this case must have conformed to in order to avoid "plain error." It is a harsh stance to require Appellant to allege "plain error" in order to appeal his conviction when it is impossible for him to do so.

This situation of dealing with an issue of first impression could be seen to present an "exceptional circumstance" which justifies its being raised for the first time on appeal. State v. Archambeau, 820 P.2d 920 (Ut. Ct. App. 1991) speaks of the "exceptional circumstances" exception. This exception is allowed so as to prevent manifest injustice that would result from failure to consider an issue on appeal. Id. Since the issue of the possible double jeopardy effect of this type of prosecution has never been decided before, it is not one which would be readily apparent during the trial phase of the prosecution and is one on which there is no real possibility of alleging "plain error" due to the lack of precedent upon which an error can be judged. To not allow Appellant to raise this issue on appeal would result in "manifest injustice" since it would penalize Appellant for the lack of precedent that prevents him from alleging "plain error."

There is also the unusual circumstance in this case of the State prosecuting Appellant in district court, rather than before the Utah Tax Commission. In the previous cases where the Utah Illegal Drug Stamp Tax Act was being enforced, the matter was taken up civilly before the

Tax Commission, leading this Court that heard the appeals from those decisions to classify those proceedings as quasi-criminal in view of the severity of the tax imposed. See Zizzi v. State Tax Commission, 842 P.2d 848 (Utah 1992); Sims v. Collection Division of State Tax Commission, 841 P.2d 6 (Utah 1992). Cf. State v. Robinson, 797 P.2d 431 (Ut. Ct. App. 1990)(constitutional challenge to Stamp Act not reached); State v. Davis, 787 P.2d 517 (Ut. Ct. App. 1990)(issue of self-incrimination decided). In this case, the State prosecuted Appellant on the criminal portion of the Stamp Act, not the tax provisions. This leaves the district court with next to no guidance as to how the issues presented by the Stamp Act are to be handled. Therefore, the district court is incapable of clearly erring in their judgment, which then hampers an attempt at appeal by cutting off one of the few avenues to appeal that would allow Appellant to raise a defense that was not readily apparent at the time of trial.

State v. Jameson, 800 P.2d 798 (Utah 1990), allowed the appellant in that case to raise the issue of double jeopardy for the first time on appeal, citing the liberty interest exception. This liberty exception was further discussed in State v. Archambeau, 820 P.2d 920 (Ut. Ct. App. 1991), where the Court found that the liberty exception was too broad to justify raising a constitutional issue for the first time on appeal by itself, but that it was usually invoked in situations involving “plain error” or “exceptional circumstances” as well.

[A] defendant may not assert a constitutional issue for the first time on appeal unless he can demonstrate "plain error" or "exceptional circumstances." The fact that a "liberty interest" is at stake is merely one factor articulated by the [Utah Supreme Court] to be considered when determining whether "exceptional circumstances" exist.

Id. at 925. In this case, Appellant’s liberty is at stake due to the Stamp Act’s imposition of criminal penalties. This fact, combined with the unusualness of the State’s prosecution of the

violation of the Stamp Act in district court rather than before the Tax Commission and the unavailability of the “plain error” exception, lead to the conclusion that “exceptional circumstances” exist that would allow the issue of double jeopardy to be raised for the first time on appeal.

Contrary to the State’s representation of the validity of Appellant’s double jeopardy claim, the Stamp Act does include the element of intent to distribute in its proof requirements. Utah Code Ann. Section 59-19-106(2) states that “a *dealer distributing* or possessing marijuana or a controlled substance without affixing the appropriate stamps, labels, or other indicia is guilty of a third degree felony.” (Emphasis added). While a dealer is defined in Section 59-19-102(2) as one who “manufactures, produces, ships, transports, or imports into Utah or in any manner acquires or possesses” more than the specific amounts of controlled substances listed in the Stamp Act, the commonly understood definition of a dealer implies the intent to distribute the controlled substance. If the person accused of possession of a controlled substance intended it only for personal use, he would not be classified as a “dealer,” only as a “user.” The Webster’s definition of the word “deal” is “to apportion: distribute.” Therefore, the Stamp Act, which specifically applies to dealers, includes the element of intent to distribute.

As put forth in Appellant’s Brief, all of the elements required for conviction for possession with intent to distribute are included in the elements required for conviction under the Stamp Act with the Stamp Act adding the additional element of a failure to affix the tax stamps to the controlled substance. This therefore makes possession with intent to distribute a lesser included offense to the violation of the Stamp Act. Duran v. Cook, 788 P.2d 1038 (Ut. Ct. App. 1990) states that a defendant may be convicted either of a greater or a lesser included

offense arising from a single criminal episode, but not both offenses. An offense is considered included if it is established by proof of the same or less than all the facts required to establish the commission of the offense charged. Where two crimes are such that the greater cannot be committed without necessarily having committed the lesser, one cannot be convicted for both.

IV. The statutory vagueness challenge to the Illegal Drug Stamp Tax Act was preserved for appeal, despite the lack of the use of the specific wording, due to the fact that the vagueness of the quantity provisions in the statute were raised to the consciousness of the trial court at trial.

During the course of the trial, the trial court heard a motion to dismiss advanced by Appellant based on the fact that the language of the statute was unclear as to how much of a controlled substance must be found within an impure or diluted substance in order for the entire amount of the substance to qualify for the tax under the Stamp Act. (Transcript pgs. 334-337)

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” Grayned v. City of Rockford, 408 U.S. 104, 108. 92 S.Ct. 2294, 2298 (1972). The statutory language should be sufficiently clear that people of ordinary intelligence can understand what is required for compliance. Id. at 104, 2298-99. The trial court expressed uncertainty as to how the statute was intended to be interpreted, therefore, it stands to reason that the meaning of the statute was also unclear to people of ordinary intelligence. If the trial court itself is uncertain as to the proper interpretation of the statute’s provisions, then it cannot be frivolous for one who is charged with a crime to ask for an interpretation of the statute from an appellate court.


The trial court heard argument from Appellant and the State concerning the interpretation of the statute as to that question and found in favor of the State based on a

comparison with other statutes concerning dealers and on his own ideas as to the reasons behind the Legislature's wording of the provision in question. (Transcript p. 336) This demonstrates that the question as to the statutory vagueness of the statute was raised to the consciousness of the trial court and therefore preserved for appeal.

CONCLUSION

Based on the foregoing Reply Memorandum, it appears that there is a sufficient record on appeal for the issues put forward by Appellant to survive a summary dismissal and to allow the issues raised in Appellant's brief to be heard and decided by this Court.

Respectfully submitted,


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Attorney for Appellant

ADDENDUM

59-19-102. Definitions.

Statute text

As used in this chapter:

- (1) "Controlled substance" means any drug or substance, whether real or counterfeit, as defined in Section 58-37-2, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Utah laws. It does not include marihuana.
- (2) "Dealer" means a person who, in violation of Utah law, manufactures, produces, ships, transports, or imports into Utah or in any manner acquires or possesses more than 421/2 grams of marihuana, or seven or more grams of any controlled substance, or ten or more dosage units of any controlled substance which is not sold by weight.
- (3) "Marihuana" means any marihuana, whether real or counterfeit, as defined in Section 58-37-2, that is held, possessed, transported, transferred, sold, or offered to be sold in violation of Utah laws.

History

History: C. 1953, 59-19-102, enacted by L. 1988, ch. 246, ° 2.

59-19-106. Civil penalty - Criminal penalty - Statute of limitations - Burden of proof.

Statute text

- (1) Any dealer violating this chapter is subject to a penalty of 100% of the tax in addition to the tax imposed by Section 59-19-103. The penalty shall be collected as part of the tax.
- (2) In addition to the tax penalty imposed, a dealer distributing or possessing marihuana or controlled substances without affixing the appropriate stamps, labels, or other indicia is guilty of a third degree felony.
- (3) An information, indictment, or complaint may be filed upon any criminal offense under this chapter within six years after the commission of the offense. This subsection supersedes any provisions to the contrary.
- (4) Any tax and penalties assessed by the commission are presumed to be valid and correct. The burden is on the taxpayer to show their incorrectness or invalidity.

History

History: C. 1953, 59-19-106, enacted by L. 1988, ch. 246, ° 6; 1989, ch. 242, ° 2.