1995

West Valley City v. Dennies : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

West Valley City, Plaintiff and appellee, vs. Curtis Lynn Dennies, Defendant and appellant,	Appeal No. 950427 (trial case no. 951001684) **BRIEF OF APPELLANT**

An appeal from the Third Circuit Court, West Valley Department, the Honorable Judge Nehring, presiding. Argument priority classification under rule 29(b): (2) appeal from conviction of criminal matter.

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STATEMENT SHOWING JURISDICTION OF THE APPELLATE COURT

Utah Code section 78-2a-3(2)(d) and (f) grant jurisdiction of appeals of criminal misdemeanor convictions in the circuit court.

STATEMENT OF THE ISSUES

Following are the issues presented by this appeal, which are each to be reviewed under the clear weight of the evidence test.

1. Can a knife be both clearly visible, and "concealed," at the same moment? [19:11][1]

2. If the knife is deemed "concealed" to officers, can it simultaneously be "unconcealed" to defendant, so as to place defendant on notice of its presence? [33:22]

3. Did the prosecution demonstrate a sufficient nexus between defendant and the spoon, for the trial court to conclude that defendant possessed the spoon? [19:23; 35:2]

4. Is a spoon drug paraphernalia? [35:12, 16]

5. Was there cause to search the vehicle, under the guise of an impound, when no effort was first made to contact the vehicle owner? [23:5]

DETERMINATIVE STATUTES SET FORTH VERBATIM

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[1]References to the record, designating the location in the record where questions were reserved for appeal, appear in brackets. For example, 19:11 refers to page 19, and line 11, of the trial transcript.

Utah Code § 76-10-504, sub-part (1), provides as follows:

"Any person, except those persons described in Section 76-10-503 and those persons exempted under Section 76-10-510, carrying a concealed dangerous weapon, as defined in this Part 5, is guilty of a class B misdemeanor, except that a firearm that contains no ammunition and is enclosed in a case, gun box, or securely-tied package shall not be considered a concealed weapon, but:

a) If the dangerous weapon is a firearm and contains no ammunition, he shall be guilty of a class B misdemeanor;

b) If the dangerous weapon is a firearm and contains ammunition, he shall be guilty of a class A misdemeanor; or

c) If the dangerous weapon is a sawed-off shotgun, or if the dangerous weapon is a firearm and is used to commit a crime of violence, he shall be guilty of a felony of the third degree."

Utah Code §58-37a-4 provides as follows:

In determining whether an object is drug paraphernalia, the trier of fact, in addition to all other logically relevant factors, should consider:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to a

controlled substance;

3. The proximity of the object, in time and space, to a direct violation of this chapter;

4. The proximity of the object to a controlled substance;

5. The existence of any residue of a controlled substance on the object;

6. Instructions whether oral or written, provided with the object concerning its use;

7. Descriptive materials accompanying the object which explain or depict its use;

8. National and local advertising concerning its use;

9. The manner in which the object is displayed for sale;

10. Whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

11. Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;

12. The existence and scope of legitimate uses of the object in the community; and

13. Expert testimony concerning its use.

Utah Code § 58-37a-5(1) provides as follows:

"It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body in violation of this chapter. Any person who violates this subsection is guilty of a class B misdemeanor."

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is in the nature of a criminal action, in which defendant Curtis Dennies was prosecuted by plaintiff West Valley City for carrying a concealed dangerous weapon, and possessing drug paraphernalia, alleged to have occurred on April 8, 1995, in West Valley City.

B. COURSE OF PROCEEDINGS

The case was commenced on April 11, 1995. A formal information was filed on May 31, 1995. A bench trial was held on June 15, 1995, before the Honorable Ronald E. Nehring, of the Third Circuit Court, West Valley Branch.[2]

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[2] At trial, Plaintiff was represented by Valerie O'Brien, a City Prosecutor. Defendant Curtis Dennies was represented at trial (and in this appeal) by Mark Gregersen, of L. Bruce Larsen and Associates, in their capacity as Public Defender in West Valley City.

C. DISPOSITION IN TRIAL COURT

At the conclusion of the trial, defendant Dennies was found guilty of both charges. Defendant Dennies was sentenced on July 31, 1995. Thereafter, the court graciously granted a stay of sentence pending appeal.

D. STATEMENT OF FACTS RELEVANT TO ISSUES

(1) OFFICER HUDSON

At trial, West Valley City first called as a witness Officer Hudson, who offered the following testimony:

The vehicle, pulled over by officers, was driven by Mr. Terry Burgess [4:16]. Defendant Curtis Dennies occupied the front passenger seat [6:5]. A third occupant, a female, was present in the back seat [13:10]. (The officer declined to record the name of this third occupant [13:19].)

The officer did not attempt to contact the owner of the vehicle, before deciding to impound and search the vehicle [11:8].

No tests for finger prints were conducted regarding a knife and spoon which were found in the vehicle [14:4; 14:6].

(2) OFFICER GRAY

Next, the city called Officer Gray, who testified to the following:

While searching the vehicle, Officer Gray located a knife, between the passenger seat and the center console [16:5]. The handle of the knife was plainly visible outside of the vehicle [17:6]. The spoon contained a dry powder residue [16:20]. No tests were performed on the spoon, to analyze whether the residue was comprised of illegal drugs [19:23].

Syringes were found inside of the vehicle, located inside of the console, and underneath of the driver's seat [17:16]. (The city did not allege that defendant Dennies possessed the syringes [See City's Formal Information, Probable Cause Statement].)

(3) TERRY BURGESS

After the city rested, defendant called Mr. Terry Burgess, who testified under oath as follows:

Mr. Burgess had been operating the vehicle. Mr. Burgess had given defendant Dennies a ride in the vehicle [24:21]. The vehicle belonged to a person named Bryan [29:9].

Prior to the search of the vehicle, Mr. Burgess informed the officers of the whereabouts of the vehicle owner. A distance of three blocks separated the owner from the location of the vehicle and officers [27:15].

(4) BRYAN FREW

Bryan Frew testified that he was the owner of the vehicle [29:10].

(5) DEFENDANT CURTIS DENNIES

Curtis Dennies testified that after Dennies stepped into the vehicle, he found that the inside light did not function, and that the interior of the vehicle was dark [32:8].

SUMMARY OF THE ARGUMENT

The knife was plainly visible to officers, and therefore not a concealed weapon. Even if the knife were concealed, defendant then cannot be deemed to have noticed its presence. No nexus exists between defendant and the spoon. The spoon was not drug paraphernalia. No exigency existed, for the warrantless search of the vehicle where the spoon and knife were found.

DETAIL OF THE ARGUMENT

A. KNIFE CONCEALED?

As of April 8, 1995, Utah Code section 76-10-504 provided in relevant part as follows:

"(1) Any person ... carrying a concealed dangerous weapon ... is guilty of a ... misdemeanor ...." (Emphasis added).[3]

Here, the handle of the knife was plainly visible to Officer Gray,

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[3]U.C.A. § 76-10-504 was amended, effective May 1, 1995.

while Officer Gray was outside of the vehicle [17:6]. Therefore, the knife was not concealed.[4]

B. KNIFE POSSESSED BY DEFENDANT?

Again, section 76-10-504 provide that "(1) Any person ... carrying a concealed dangerous weapon ... is guilty of a ... misdemeanor ...." (Emphasis supplied).

Here, defendant Dennies was a passenger in a vehicle with two other occupants [4:16; 6:5; 13:10]. Defendant Dennies did not own the car [29:10]. A knife was found between the console and the front passenger seat, so that it was in between the driver and Defendant Dennies [16:5]. The knife was not tested for finger prints [14:4]. Defendant made no admission that the knife was his, or that he had placed it in the car [note absence of admission in transcript of trial]. Therefore, there was no basis to conclude that it was defendant Dennies who possessed the knife.

Further, here counsel for the city asserted that the knife was concealed.[5] The city cannot have it "both ways." If the knife were truly concealed, then it would have been hidden from the view of defendant

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[4]Although the court held defendant Dennies guilty, the court remarked during argument that concealment was the question which the court was worried about [38:16]. The court also remarked that regarding concealment, it was a close call [43:16].

[5]This position was taken even though officers used the Plain View exception to conduct the warrantless search.

Dennies, and Mr. Dennies cannot be charged with knowledge of the knife.

C. SPOON POSSESSED BY DEFENDANT?

Utah Code section §58-37a-5 provides in part as follows: "(1) It is unlawful for any person to ... possess with intent to use, drug paraphernalia to ... ingest ... a controlled substance ...." (Emphasis added).

In determining whether a suspect possessed drugs (or in this case a spoon alleged to be drug paraphernalia), no nexus between the suspect and the object is established by mere occupancy of a vehicle, especially when the occupancy is not exclusive. State v. Salas, 820 P.2d 1386 (Utah App. 1991).

Here, defendant Dennies rode as one of three persons in a vehicle. Dennies was neither the owner of the vehicle, nor the operator who controlled the vehicle. Dennies had been given a ride in the vehicle [4:16; 6:5; 13:10; 24:21; 29:10]. Therefore, defendant's presence in the vehicle fails to establish defendant's possession of the spoon.

In considering whether there is possession of an object, the following factors are to be considered: 1) incriminating statements, 2)

suspicious behavior, 3) sale of contraband, 4) use of contraband, 5) proximity of the suspect to the contraband, 6) whether the contraband is in plain view, and 7) whether the suspect has contraband on his person. See State v. Salas, Id.

Here, 1) no evidence was offered that defendant Dennies made any incriminating statement. 2) There is no evidence of Dennies engaging in any suspicious behavior. For example, Dennies did not attempt to flee from the officers. 3) There is no evidence that Dennies was attempting to sell the spoon , drugs, or any contraband. 4) There is no evidence that Dennies used the spoon. For example, no one observed Denies use the spoon, and no finger print tests were conducted on the spoon. 5) In the dark car, Dennies appears to have seated himself near in proximity to the spoon, but this alone is not enough. 6) On the floor of the dark vehicle, it is unlikely that the spoon was in plain view. 7) Dennies was not found to have the spoon, drugs, or any contraband on his person.[6]

Considering this evidence, there is no basis on which to conclude that a nexus is established between Dennies and the spoon.

Further, the statute requires proof of intent to use the paraphernalia. Not one scintilla of evidence was introduce regarding

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[6]This "nexus" analysis may also be applied to the knife, to demonstrate that defendant did not carry the weapon.

intent to use. [Note absence in trial transcript.]

Therefore, Dennies did not possess the spoon.

D. SPOON AS DRUG PARAPHERNALIA?

Pursuant to Utah Code section §58-37a-4, in determining whether an object is drug paraphernalia, the court should consider the following factors, among others:

(2) Prior convictions for the use of a controlled substance.

(5) Any residue of a controlled substance on the object.

(12) "The existence and scope of legitimate uses of the object in the community."

Here, no evidence was offered that defendant Dennies had prior convictions for use of a controlled substance [note absence in record]. An officer described the spoon as containing residue [16:20]. However, no tests were performed as to whether this was residue of illicit drugs or of a legitimate substance [19:23]. (Also, the Court of Appeals is invited to view the ordinary nature of the spoon, and the "residue" thereon, as an exhibit admitted into evidence.) The trial court should have taken judicial notice of the existence and scope of the legitimate uses in our community of a spoon.

Considering the above, the spoon should not have been considered drug paraphernalia.

E. CAUSE TO SEARCH?

The Fourth Amendment to the United States Constitution prohibits all unreasonable searches. Katz v. Unites States, 389 U.S. 347. Warrantless searches are per se unreasonable unless undertaken pursuant to a recognized exception to the warrant requirement. Id. Evidence obtained from an illegal search is excluded.

Here, counsel for the city asserted that the knife was concealed (even though Officer Gray declared that the knife was clearly visible). Assuming for the sake of argument that the knife were not visible, then officers lose their justification for a Plain View search of the automobile.

Here, the officers claimed belief that the driver of the vehicle was not properly licensed. But this falls short of cause to impound or search the vehicle. The owner of the vehicle was nearby. The driver informed the officers of the owner's location [27:15]. Yet the officers made no effort to summons him to retrieve his vehicle. Instead, officers searched the vehicle. The strong implication is that the officers sought a pretext to search the vehicle.

It is clear that no exigency existed. Therefore, the search was unlawful, and fruits thereof must be excluded.

F. STANDARD OF REVIEW

A bench trial, when reviewed for sufficiency of the evidence, is not sustained if the judgment is against the clear weight of the

evidence, or if the court of appeal otherwise reaches a definite conviction that a mistake has been made. State v. Goodman, 763 P.2d 786 (Utah 1988).

CONCLUSION AND RELIEF SOUGHT

Defendant Curtis Dennies rode as one of three occupants in a vehicle with kitchen utensils: a knife and a spoon. It is respectfully asserted that his convictions for drug paraphernalia and concealed dangerous weapon are against the weight of the evidence, and should be overturned.

STATEMENT REGARDING ADDENDUM

No addendum is necessary.

Dated this 7th day of November, 1995.

Mark J. Gregersen
Counsel for Defendant and Appellant
Curtis Dennies

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of November, 1995, I mailed two true and correct copies, postage prepaid, of the foregoing BRIEF OF THE APPELLANT to J. Richard Catten, Esq, Office of the West Valley City Prosecutor, 3600 South Constitution Blvd., West Valley City, Utah 84119.

Mark J. Gregersen