1995

State of Utah v. Robert G. Johnson : Reply Brief

Utah Court of Appeals

Thomas R. Brunker.
Robert G. Johnson; appellant pro se.

IN THE UTAH COURT OF APPEALS DOCKET NO. 950531-C

STATE OF UTAH,

Plaintiff and Appellee,

V. No. 950531-CA

ROBERT G. JOHNSON,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

Appeal from a final judgment of conviction, Second Judicial District Court, Weber County, State of Utah
Hon. Michael Lyon, Presiding

Robert G. Johnson
Defendant-Appellant Pro Se
5671 South Willow Wood Court
Ogden, Utah 84403
(801) 476 8863

CATEGORY (2)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Appellee,

V. No. 950531-CA

ROBERT G. JOHNSON,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Argument: 1) In the Statement of the Case section of the answering brief Ass't AG Beadles states,

> "Defendant . . . told potential investors that they would get back twice their investment (R. 44). He further informed the potential investors that the scheme was a "sure thing." (id.).

Beadles takes from the Affidavit of Probable Cause, r. 35-50, not from the transcript of trial testimony. The evidence at trial is to the contrary, i.e., defendant Johnson made no such representations nor did he "t[ell]" or "inform[]" potential investors.

2) In the Summary of the Argument section of the answering brief Beadles states,

> "The term "investment contract" has been defined by Utah case law since 1983 and federal cases since 1946. Its meaning is not vague; rather it has been settled for

decades."

The cases (Utah's Payable Accounting and US Supreme Court's Howey) upon which Beadles relies are civil. In State v. Pickus, 257 NW 284, 295 (S.D. 1934) the court stated,

> ". . . whatever the courts may have seen fit to do in the field of civil liability for [securities violations] the situation with reference to criminal liability for [securities violations] must be governed and controlled by our statute. . . . [I]f a man] is to be criminally held it must be by legislative act and not by judicial decision. [The term "investment contract"] in our criminal statute has [no] well-recognized meaning. . . . It cannot and should not be stretched by judicial decision.
>
> ". . . the Legislature has not [defined "investment contract" in the criminal statute]; and where the Legislature has not the court cannot."

Further on in his argument summary Beadles states,

> "Under the doctrine of "stare decisis," which obligates courts to follow the decisions of higher courts, this Court cannot declare the Utah Supreme Court's definition of "investment contract" void. Therefore, defendant's request for that relief should be denied."

Defendant has not asked the Court to "declare the Utah Supreme Court's definition of "investment contract" void;" he asks only that the statute, applied criminally against him, and containing the term "investment contract," the particular security the state claims was involved in the charges made against him, be declared unconstitutionally vague "as applied" to him.

Even further on in the summary of argument section of the

answering brief Beadles states,

> "Defendant stipulated that the investments were securities. Given that stipulation, the trial court's admission of expert testimony regarding the status of the transactions as investment contracts, and therefore, securities, was harmless even if error."

Defendant did not so stipulate. But Beadles' claim does bring us directly to the core mischief in this prosecution, i.e., there is no investment contract and no security otherwise is present and therefore there can be no securities violation to prosecute. There was, therefore, no probable cause to commence or continue this prosecution. From the record it can only be inferred that the trial judge sensed this. In the colloquy at r. 1335-1336, the trial judge, now retired, stated to defendant's counsel in the first trial,

> ". . .and this ends the question of whether or not you [the prosecution] have to bring in experts in on security. [To Mr. Bottum, now deceased, defendant's counsel in the first trial] It's admitted it's a security?
>
> "MR. BOTTUM: Yes."

There was no reason whatever, from the trial court's standpoint, or the defendant's, that such a stipulation should be sought or that the defendant's counsel should stipulate to have defendant waive the requirement that the state prove beyond a reasonable doubt every element of the offense charged, especially the core element in a securities

violations criminal case, the presence of a security.

But in this rarest of cases, the stipulation was sought by the trial judge, and acceded to by defendant's counsel, in the most extremely coercive circumstances possible for a defense attorney, i.e., Bottum had been implicated in the same charges on which defendant was being tried and he himself suffered the threat of prosecution on those charges if he did not cooperate with the trial judge and prosecution in assuring defendant's conviction, which, of course, came about. And the trial judge, as well as the prosecution, fraudulently and deceptively, instructed the jury "[y]ou are instructed that the Defendant and his counsel stipulate and agree . . ." r. 562. The state's retort is that the statute had run and therefore attorney Bottum could not be charged at the time of the offending stipulation. Defendant knows that the deal was made long before the first trial between Bottum and Attorney General Van Dam, personally.

But all this happened before, and related to, the first trial. In the second go-around there was no stipulation and no instruction as Beadles claims. Facilitated by the bizarre doings of trial judge Lyon, defendant was convicted on all counts and this appeal resulted. See, for instance, Instructon 27, which invokes more than one statutory

alternative, each with different elements, without requiring that the jury indicate on which of the alternatives it has based the defendant's guilt; and then quotes the Howey elements of an investment contract with the relevant facts unaddressed.

With such egregious [and criminal] conduct on the part of the trial judge and the state's prosecutors, including Van Dam, the Court of Appeals, on 14th Amendment Due Process grounds, was required to dismiss the prosecution, with prejudice, after the first trial. Judges Greenwood, Garff, and Russon however, sent the matter back for a new trial although at the time they knew, or should have known, that there was no probable cause for the first trial. [Opinion at 823 P.2d 494.]

A waiver by defense counsel of defendant's right to have the state prove beyond a reasonable doubt every element of the offense charged is ineffective without defendant's knowing consent. This was pointed out in defendant's opening brief in the first appeal, with authorities, at page -54-.

Then, in the final paragraph of the argument summary section of Beadles' answering brief, the Court is urged to "refuse to review defendant's claim of insufficiency because he has not even attempted to marshal the evidence."

Defendant proceeds under the Due Process protections of the 14th Amendment as enunciated in Jackson v. Virginia, 443 U.S. 307 (1979). The holding there contemplates the "no evidence" rule, in other words, as applied to this case, a rational juror could not have found the essential element, to-wit, the presence of a security [investment contract] and therefore no sale or purchase of a security, beyond a reasonable doubt because there is no evidence of a security in the trial (2nd) record. Under the Jackson standard, the appellate court reviews the record de novo. Flieger v. Delo, 16 F.3d 878 (8th Cir. 1994) Therefore, there is no evidence in favor of a finding of "security" or "investment contract" to marshal, and under the Jackson standard, there is no requirement to marshal the evidence anyway, the appellate court must review the entire record. Flieger, supra.

As in State v. Bullock, 791 P.2d 155, 161, (Utah 1989), dissent of Justice Stewart, "this is a classically appropriate case for application of the manifest error doctrine." Both trials were in themselves wholly and totally error, constitutional error. The definitional statements of Justice Stewart in his dissent may be looked to by those justices interested in imparting justice in this case.

Conclusion: Defendant/appellant requests that this

matter be remanded to the trial court with directions to dismiss the prosecution for no probable cause; there was no security [investment contract] present in the transactions described in the evidence and testimony in the second trial; the presence of a security, the one specified in the charging documents, is a necessary element to be proved in a securities violation criminal case.

Plaintiff/appellee's answering brief is not grounded in fact, not warranted by existing law, and not based on a good faith argument to extend, modify, or reverse existing law, was interposed for the purpose of delay, to harass, cause needless increase in the cost of litigation, and to gain time that will only benefit plaintiff/appellee; and therefore, defendant/ appellant requests an award of sanctions of at least $5000.00 against the State of Utah to be paid by the Attorney General.

DATED April 14, 1997.

ROBERT G. JOHNSON
Defendant-Appellant Pro Se
5671 South Willow Wood Court
Ogden, Utah 84403
(801) 476 8863

On April 14, 1997, two copies hand-delivered to the office of James Beadles, 160 East 300 South - 6th Flr, Salt Lake City, Utah 84114.