1986

Utah v. Miller : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
	:	
Plaintiff/Respondent,	:	
	:	Case No. 860347-CA
vs.	:	
	:	
LEONARD G. MILLER,	:	Priority No. 2
	:	
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF RETAIL THEFT WHILE ARMED WITH A DEADLY WEAPON, A SECOND-DEGREE FELONY. AGGRAVATED ASSAULT, A THIRD-DEGREE FELONY; AND POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A THIRD-DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JUDITH M. BILLINGS, PRESIDING.

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STATE OF UTAH Plaintiff/Respondent, vs. LEONARD G. MILLER, Defendant/Appellant.	:	Case No. 860347-CA Priority No. 2

JURISDICTION

This appeal is from convictions of a second-degree felony and two third-degree felonies in Third District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

STATEMENT OF ISSUES

1. Was defendant denied his right to a speedy trial due to the five month delay between his arrest and trial where both defendant and the State were responsible for portions of the delay and where defendant did not assert his right to a speedy trial until after trial?

2. Did the trial court subject defendant to double jeopardy when it reversed its order dismissing the aggravated assault charge where the disorderly conduct charge to which defendant previously pled guilty did not arise out of the same conduct as the aggravated assault charge?

STATEMENT OF THE CASE

Defendant, Leonard G. Miller, was charged with aggravated robbery, a first-degree felony, in violation of Utah Code Ann. § 76-6-302 (1978); or in the alternative, retail theft while armed with a deadly weapon, a second-degree felony, in violation of Utah Code Ann. § 76-6-602(1) (1978); and aggravated assault, a third-degree felony, in violation of Utah Code Ann. § 76-5-103 (1978); and possession of a dangerous weapon by a restricted person, a third-degree felony, in violation of Utah Code Ann. § 76-10-503 (1978). Defendant was convicted of the retail theft, aggravated assault and weapon possession charges by the court sitting without a jury on May 7, 1986 in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judith M. Billings presiding. Judge Billings sentenced defendant on May 30, 1986, to one term of 1 to 15 years and 2 terms of 0 to 5 years to run concurrently.

STATEMENT OF FACTS

The charges in this case arose out of an incident at a Food-For-Less store at 1500 West 3500 South, in West Valley City on December 4, 1985 (R. 79-80). Defendant walked out of the store that day carrying a case of beer and a carton of cigarettes without paying for them (R. 81-82). An employee, David Bennion, followed defendant from the store and requested his receipt (R. 82). When defendant held up a piece of paper that looked crumpled and did not look like a Food-For-Less receipt but would not give it up for inspection, Mr. Bennion asked defendant to return to the store and point out the cashier who had taken defendant's money (R. 83).

Defendant refused and Mr. Bennion attempted to pull defendant by the arm back inside the store (R. 84). Defendant bent down and placed the beer and cigarettes on the ground and pulled a knife from the sheath at his hip as he returned to a standing position (R. 84-85). Mr. Bennion released defendant's arm because he saw the knife. Defendant said Bennion could keep the merchandise but defendant would not go back inside the store (R. 85). Defendant returned the knife to its sheath and Mr. Bennion picked up the merchandise.

As Mr. Bennion returned to the store, defendant called after him (R. 85). Defendant admitted taking the merchandise, said he was in a tight spot and thanked Bennion for letting him go (R. 85). Mr. Bennion returned to the store, enlisted the help of other employees and returned outside to look for defendant but found defendant was gone (R. 86). A bystander gave Bennion defendant's license plate number and Bennion passed it on to Officer Simpson, who later arrested defendant at his home (R. 86-87, 102, 104, 107). At the time of this incident, defendant was a parolee under the supervision of Adult Probation and Parole (R. 112).

Defendant was originally charged with aggravated assault and retail theft while armed with a deadly weapon in case number CR85-1692 (R. 117). On December 6, 1985, while he was in custody and awaiting disposition of that case, defendant was transported to West Valley City to answer an assault charge filed there (R. 11). The West Valley information dated December 20, 1985 alleged that defendant assaulted David Bennion on November

9, 1985 at 1476 West Parkway (R. 9). It did not allege use of a weapon.

Defendant appeared before Judge Billings in case number CR85-1692 on January 31 1986 and moved to dismiss the aggravated assault charge on David Bennion (R. 117). The grounds alleged for dismissal were that he had pled guilty to disorderly conduct, a lesser-included offense of the simple assault charge, in the West Valley City case. Defendant asserted that the West Valley City charge grew out of the December 4 shoplifting incident. Judge Billings, accepting defendant's assertion, apparently dismissed the aggravated assault charge (R. 144).[1]

Prior to the dismissal, on January 7, 1986, the State had refiled, under a new information, the present case adding the charge in Count Three and the alternate charge in Count One (R. 125, 131). Because this case included an aggravated assault charge, Judge Noel refused to bind defendant over on that charge until the State moved for reconsideration of the dismissal by Judge Billings (R. 131-132). Judge Billings reconsidered the order of dismissal on April 2, 1986 and reversed (R. 146). The basis for the court's reversal was that the West Valley City case arose from a separate incident occurring on a different day than the Food-For-Less incident and upon a different victim. Judge Billings recommended that defendant seek to withdraw his guilty plea in the West Valley case since defendant said he believed at

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[1] While there is no order of dismissal appearing in the record on appeal, Judge Billings refers to her ruling in the transcript of the State's Motion to Reconsider dated April 2, 1986 at R. 144-145.

the time he was pleading guilty to a charge arising from the Food-For-Less incident.

SUMMARY OF ARGUMENT

I. Under the test laid down in Barker v. Wingo and adopted by the Utah Supreme Court, defendant was not denied a speedy trial. The five-month delay between his arrest and trial was not extraordinary, much of the delay was caused by defendant's efforts to get one of the charges dismissed erroneously, defendant never asserted the right to a sppedy trial and defendant was not prejudiced by the delay.

II. Defendant was not subjected to double jeopardy when the trial court reversed its order dismissing the assault charge. The court's dismissal was based upon an erroneous factual representation by defendant that he had already pled guilty to a lesser offense arising out of the December 4, 1985 shoplifting incident. Because defendant actually pled guilty to an offense that, as charged, was a factual hybrid of the shoplifting on December 5 and another incident on November 9, 1985, he did not plead guilty to a lesser included offense of the December 6 incident and the trial court properly decided to reverse its order of dismissal.

ARGUMENT

POINT I

FIVE MONTHS DELAY BETWEEN ARREST AND TRIAL DID NOT DENY DEFENDANT HIS RIGHT TO A SPEEDY TRIAL

Defendant was arrested on December 4, 1985 and remained in custody until his trial on May 5, 1986. Defendant asserts

that this delay denied him his right to a speedy trial. He requests this Court to reverse his convictions and order dismissal of the charges as the only remedy for his alleged prejudice.

The Utah Supreme Court has adopted the Barker v. Wingo, 407 U.S. 514 (1972), test for determining whether a defendant has been denied his right to a speedy trial. State v. Ossana, ____ P.2d ___, Case No. 20779 slip op. at 6 (Utah decided June 17, 1987). The Barker test requires balancing of the conduct of both the prosecution and the defendant. Id. There are four factors that must be weighed: length of delay, reason for delay, defendant's assertion of the right, and prejudice to defendant resulting from delay. Id. Application of these factors to this case reveals that defendant's speedy trial right was not infringed.

First, the length of the delay in this case was not extraordinary. While Utah Code Ann. §§ 77-1-6(f) and (h) (1982) provides a 30-day time limit for trial of incarcerated individuals, that time period is directory, not mandatory. State v. Lozano, 462 P.2d 710 (Utah 1979). Moreover, the delay in this case cannot be wholly attributed to the State as defendant asserts.

In this case, defendant was tried five months after his arrest. While there is nothing in the record to indicate the original trial date, defendant states that it was set for February 13, 1986. This trial date was outside the 30-day period mentioned in §§ 77-1-6(f) and (h), yet defendant does not claim

that he objected to this initial setting. While awaiting trial, however, defendant filed his motion to dismiss the assault charge of the original information. Judge Billings apparently ruled on the motion on February 5.

Defendant argues that the delays in this case must be attributed to the State because West Valley City was negligent in preparation of its case causing defendant to be confused and move for dismissal of the assault charge in this case and because the prosecutor amended the charges against defendant by filing a new information which required a second preliminary hearing. The Utah Supreme Court, however, recently upheld a conviction obtained 4½ years after arrest where the State and the defendant were pursuing related disputes which required determination prior to a trial. State v. Ossana, slip op. at 4-5. Defendant in this case filed a motion to dismiss the assault charge that was based upon facts that were incorrectly related to the trial court. As argued in Point II below, the West Valley City conviction was based upon an information that did not describe the offense described in the State's information, though it did name the same victim. Defendant's motion to dismiss represented to Judge Billings that both informations described the same offense. Because this was not the case, defendant cannot attribute the delay occasioned by the State's attempt to correct Judge Billings' erroneous dismissal to the State.

Defendant notes that the preliminary hearing on the State's second information was held on February 13, just 6 days after Judge Billings ruled on defendant's motion to dismiss.

This is a very short time period which indicates the State's desire to move the case forward in a timely manner.

While, defendant urges the Court to weigh heavily against the State the delay that occurred when Judge Noel would not issue the bind-over order on the second State's information until the State sought reversal of Judge Billings' dismissal which was erroneously granted to begin with, the State should not be charged with this time period where defendant obtained the dismissal erroneously.

Judge Billings reversed her order of dismissal on April 2 and Judge Noel bound defendant over on the new information on April 3. Again, there seems to be no undue delay in a one-day gap between these two actions by the lower courts.

Defendant was tried on May 5, only 32 days after he was bound over on the information that forms the basis for this case and 5 months after arrest. This is not an unreasonable amount of delay between arrest and trial. See State v Knill, 656 P.2d 1026, 1029 (Utah 1982) (3½ months between arrest and trial not violation of right to speedy trial).

Defendant insists that the State should be charged with the delay in his case because defendant chooses to characterize the reason for the delay as the State's attempting to overcharge defendant with robbery. Defendant ignores the fact that a third charge was added which was possession of a weapon by a restricted person. Therefore, adding the alternative robbery charge was not the "primary" reason for the new preliminary hearing as defendant alleges. The prosecutor also noted to Judge Billings that the

second information had already been filed at the time the motion to dismiss was heard on January 31 (R. 125). And, in fact, the new information is dated January 7, 1986 (R. 20). It is likely, therefore, that had defendant not erroneously convinced the trial court to dismiss the assault charge, the State would not have waited for the outcome of that motion to proceed to preliminary hearing on the second information. It was defendant's motion that delayed his trial rather than the prosecutor's decision to refile the charges. Under these circumstances, defendant indicated his willingness to temporarily waive his right to a speedy trial. Ossana, slip op. at 5 citing State v. Velasquez, 641 P.2d 115 (Utah 1982); and see State v. Banner, 717 P.2d 1325, 1329 (Utah 1986).

As for the third factor, defendant never asserted his right to a speedy trial. While a defendant who fails to assert the right has not waived it, the failure must be balanced against the other factors. Ossana, slip op. at 6. Defendant claims he asserted the right at trial, however, he certainly did not ask the trial court to dismiss the case. He merely pointed out that he had been incarcerated for six months (an erroneous estimate of the actual time) (R. 76).

Finally, defendant argues that he was prejudiced by the five-month delay because it will substantially lengthen his sentence as the Board of Pardons does not grant credit for pretrial incarceration. There are three interests to consider in the area of prejudice: "(1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused;

(3) and limiting the possibility that the defense would be impaired." Ossana, slip op. at 6. Here, defendant does not allege that his defense was impaired but states only that five month's pretrial incarceration is oppressive and that he suffered anxiety and concern.

While any length of incarceration is likely to produce anxiety and concern in most people, the five months incarceration here does not seem overly oppressive. The Utah Supreme Court has upheld cases where a defendant was incarcerated for 3½ months, State v. Knill, 656 P.2d 1026 (Utah 1982), and for 12 months, State v. Banner, 717 P.2d 1325 (Utah 1986). In Banner the Court noted that the significance of the length of incarceration was reduced where defendant acted to delay the trial as did defendant here. 717 P.2d at 1330.

Defendant also insists that the Board of Pardons does not grant credit for pre-trial incarceration. In support, he provides an outdated Policy No. A09/12. Attached in Appendix A is a copy of Policy No. 4.06, the current Board policy on the issue. Clearly, the Board does grant credit for pre-trial incarceration where appropriate. Defendant's argument on this point is consequently without merit.

Because defendant's trial was delayed only five months from his arrest and because he was responsible for a portion of the delay, failed to assert his speedy trial right and suffered little, if any, prejudice, defendant is not entitled to dismissal of the charges for lack of a speedy trial.

POINT II

REVERSAL OF THE ORDER DISMISSING THE AGGRAVATED ASSAULT CHARGE DID NOT PLACE DEFENDANT IN DOUBLE JEOPARDY

The constitutional guarantee against double jeopardy bars: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. State v. Dyer, 671 P.2d 142, 146 (Utah 1983); North Carolina v. Pearce, 395 U.S. 711 (1969). Defendant urges this Court to reverse his conviction for aggravated assault under the second scenario listed above because, he alleges, he was previously convicted for a lesser-included disorderly conduct charge for the same offense. The outline of facts presented below illustrates that defendant's allegation is wrong and that he is not entitled to reversal of the aggravated assault charge.

The information filed in West Valley City alleged that defendant assaulted David Bennion on November 9, 1985 at 1476 West Parkway (R.9). The complainant was Detective S. Coxey. The information filed in this case alleged that defendant assaulted David Bennion on December 4, 1985 at 1500 West 3500 South while armed with a knife (R. 19). The supporting witnesses were listed as Simpson, Fluckinger, Paul Jacobsen, David Bennion, Ted Elder and Kevin Kenna. Both informations referred to police report number 85-29842.

The State proffered to the trial court that the West Valley case arose from a fight between defendant and Ralph Robinson on November 9, 1985 at 1476 West Parkway (R. 135).

Somehow, after defendant was arrested for the Food-For-Less incident, someone obtained the police report for that incident and used information from it along with the citation from the Robinson fight to prepare the information for the November 9 fight. The Robinson fight is described in police report number 85027781 and resulted in both persons receiving a citation (R. 6-8). The result was that the West Valley City information did not match either incident but was a hybrid including facts from both crimes.

Defendant argues that because he thought he was pleading guilty to a lesser offense in the Food-For-Less assault, he could not be tried for the assault in the instant case because it created double jeopardy. On the contrary, however, the facts in the West Valley information do not describe the same offense as that alleged in the information in this case. Though the victim's name was the same, the date and address were different. Thus, even if this Court chooses, or the trial court had chosen, to ignore the State's proffer that the victim in the West Valley case should have been stated as Ralph Robinson, the offenses are still not the same offense for purposes of double jeopardy analysis.

Defendant may well have a valid reason to withdraw his guilty plea in the West Valley case due to the errors which caused him to be confused about the crime to which he pled guilty there. That complaint, nevertheless, does not affect the validity of his prosecution and conviction in this case and his conviction here should be affirmed.

CONCLUSION

The State requests this Court to deny Defendant's request for dismissal of the charges for lack of a speedy trial, to deny his request for reversal of his conviction of aggravated robbery for a violation of the Double Jeopardy Clause and to affirm defendant's convictions on all three counts.

DATED this 7th day of July, 1987.

DAVID L. WILKINSON
ATTORNEY GENERAL

Sandra L. Sjogren

SANDRA L. SJOGREN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 8th day of July, 1987, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing BRIEF OF THE RESPONDENT to each of the following counsel of record:

Edward K. Brass
321 South 600 East
Salt Lake City, Utah 84111

Brenda L. Ogden

APPENDIX A

UTAH BOARD OF PARDONS
POLICY AND PROCEDURE MANUAL

Number: 4.06 Date: July 14, 1986 Page 1 of 2

Title: SENTENCE EXPIRATION

Authority: Utah Code Annotated 76-3-202
Utah Code Annotated 77-35-21.5
Attorney General's Opinion dated October 26, 1978

Purpose: To establish the Board of Pardons' policy on the calculation and extension of sentence expiration dates.

Policy: It is the policy of the Board of Pardons to calculate sentence expiration dates from the date the commitment order was signed by the judge, tolling any time that an offender was an escapee or was a parole violator and not in Utah custody, and crediting any time that an offender was incarcerated prior to commitment unless it was as a result of absconding while on bail, probation, or on his own recognizance, or a condition of probation.

Original Issue Date: Revision Date: 04-06-87

5451C

Procedure: The following periods of time shall be credited toward an offender's expiration of sentence: any time served as an inmate on the initial commitment or for any parole revocation; any time served at the State Hospital pursuant to a "guilty and mentally ill" conviction; up to 180 days served on diagnostic commitments; any time served prior to commitment unless it was a result of absconding while on bail, probation, or on his own recognizance, or a condition of probation; any other time granted by the Board in accordance with the policy on Credit for Time Served, #2.05, and any time served on parole. Expiration dates shall be extended by the amount of time that an offender is a parole violator but is not in custody in Utah. That time shall be determined to be from the date a Board of Pardons warrant was issued to the date the offender was returned to Utah custody. An offender is determined to be a parole violator when his parole is subsequently revoked by the Board.

On anything less than a life sentence, the sentence expiration date shall be the date the judge signed the commitment order, plus the maximum number of years in the sentence, minus one day. This is to reflect that the sentence expires at midnight on that day.

Sentence expiration dates shall be reflected on orders of parole and disposition forms, and noted in reports to Board members by Board staff.

Upon expiration of sentence, the Board of Pardons shall be notified in writing. Upon verification of that information, the Board will then order the closing of the file.