2000

Utah v. Keith L. Moosman : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 13891

KEITH L. MOOSMAN, :

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM A JURY TRIAL VERDICT AND JUDGMENT RENDERED AGAINST THE DEFENDANT-APPELLANT IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, JUDGE, PRESIDING.

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TABLE OF CONTENTS

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OTHER AUTHORITIES CITED

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from a judgment and sentence entered against him in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

On September 19 and 23, 1974, the defendant-appellant was found guilty of the offense of Unlawful Distribution of a Controlled Substance for Value by a jury before the Honorable Jay E. Banks.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's decision.

STATEMENT OF THE FACTS

The defendant was found guilty of Unlawful Distribution of a Controlled Substance for Value and was committed to prison for the indeterminate term as provided for by law (R.41,43).

The defendant was first arraigned on April 19, 1974, and trial was set for May 20, 1974 (R.203). After numerous continuances, the trial finally began on September 19, 1974 (R.203).

On September 13, 1974, indigent appellant moved the court to bear travel expenses of an expert witness residing in Vancouver, B.C., or in the alternative for another continuance of six weeks at which time the witness was supposed to be in Salt Lake City, available, without costs to the state. The purpose of the testimony was for the qualification of results of a polygraph test taken by the defendant which was in his favor. The out-of-state expert did not administer the test to the defendant. Therefore, his only connection with the case at bar

is that he is an expert in the area of polygraph examinations. In using its discretion, the trial court suggested other noted experts in the field that might be available and denied appellant's motion.

At trial, Mr. Sid Elliott, a polygraph expert, testified on behalf of the defendant. Therefore, the trial court's denial of a particular expert is within its own discretion. Appellant had a fair trial and received due process of law and was not prevented from presenting his defense because he did have the benefit of expert testimony.

ARGUMENT

POINT I

THE COURT'S DENIAL OF THE APPELLANT'S MOTION TO EITHER PAY NECESSARY TRAVEL EXPENSES OF AN EXPERT WITNESS RESIDING IN VANCOUVER, B.C., OR IN THE ALTERNATIVE CONTINUE THE TRIAL FOR SIX WEEKS AT WHICH TIME THE WITNESS WOULD BE AVAILABLE DID NOT PREVENT APPELLANT IN PUTTING ON HIS DEFENSE TO SUCH A DEGREE THAT HE WAS DENIED DUE PROCESS OF LAW.

We recognize that a defendant in a criminal proceeding has constitutional guarantees extended him by the Sixth

Amendment to the United States Constitution and Section 12 of Article I of the Utah State Constitution to be represented by counsel and compel attendance of witnesses, and that the United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 799, 83 S.Ct. 792 (1963), held that the United States Constitution requires states to furnish counsel at state's expense to indigent defendants charged with a crime.

However, the right to have witnesses subpoenaed at state expense is not absolute and such action is committed to sound discretion of trial court and exercise of that discretion will not be disturbed on appeal unless exceptional circumstances compel it. Thompson v. United States, 372 F.2d 826 (5th Cir. 1967).

The Court in Thompson stated that if the rule were otherwise, a defendant, by claiming materiality of witnesses, might make so many demands for their attendance that expense and delay would seriously impede or prevent the administration of justice.

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The Court in Thompson stated that if the rule were otherwise, a defendant, by claiming materiality of witnesses, might make so many demands for their attendance that expense and delay would seriously impede or prevent the administration of justice.

In the instant case, appellant moved for an order to have the State bear the travel expenses of an expert witness residing in Vancouver, B.C., or in the alternative continue the case for six weeks at which time the witness supposedly would be in Salt Lake City on his own accord and available without cost to the state.

This motion is clearly within the trial court's discretion, being in the best position to observe such circumstances and make determinations to insure due process of law. Denial of this motion did not prevent the appellant from putting on his defense to such a degree that he was denied due process of law. The trial court suggested other experts in the area of the polygraph, who reside in Utah (R.205). At the trial, in behalf of the appellant, Mr. Sid Elliott, a professional polygraph examiner, testified (R.143). Mr. Elliott is a member of the California Association of Polygraph Examiners, the American Polygraph Association, the Arizona Polygraph Association, and the Utah Polygraph Association, and has given approximately five thousand polygraph examinations (R.144). Having an expert

testify in appellant's behalf at trial clearly shows that appellant was not denied due process because the court denied a motion to obtain an expert residing in Vancouver, B.C.

This principle is seen in Findley v. United States, 380 F.2d 752 (10th Cir. 1967), where the court appointed two competent psychiatrists to examine the accused and did not require physical presence of other doctors residing at different points in the United States. The Court held:

> "Under rule providing for production of witness for defense at government expense, trial court prior to issuing subpoena must determine whether requested witnesses are necessary to adequate defense and in making such determination it has duty to examine existing circumstances and should deny issuance of unnecessary subpoenas and prevent useless or abusive issuance of process, and determination whether witnesses requested are required for adequate defense rests largely upon judgment of trial court."

In United States v. Beasley, 479 F.2d 1124 (5th Cir. 1973), the Court granted subpoenas for primary witnesses sought by the indigent defendant and denied others. The Court held:

> "District courts have wide discretion to determine which witnesses requested by indigent defendant should be subpoenaed at government expense and its decision will not be disturbed except in cases of clear abuse."

In our case, there is no clear abuse of the trial court's discretion. The appellant in this case was arraigned on April 19, 1974, and trial was set for May 20, 1974. If the motion would have been granted it would have been the fourth continuance in this case (R.203). Because of the availability of other experts a continuance to clog an already crowded docket is not reasonable grounds to grant such a motion.

It is well settled law in the State of Utah that a request for continuance is addressed to sound discretion of trial court and its ruling will not be disturbed unless there is plain abuse of such discretion. State of Utah v. Mathis, 319 P.2d 134, 7 Utah 2d 100 (1957); State v. Hartman, 119 P.2d 112, No. 6366 (1941). In our case, the denial of appellant's motion is simply not clearly prejudicial to warrant reversible error.

CONCLUSION

In this case, the appellant had expert testimony at his trial. Therefore, he was not denied due process of law. The trial court, having the advantage of examining the facts, did not clearly abuse its discretion in denying appellant's motion. In the absence of such clear abuse, appellant's claims are frivolous and totally without merit. Respondent respectfully submits that the lower court decision be affirmed.

Respectfully submitted,

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