1976

Utah v. Carlton Curtis : 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-

CARLTON CURTIS,

Defendant-Appellant.

Case No. 14411

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT AND SENTENCE OF
THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR
UTAH COUNTY, STATE OF UTAH,
THE HONORABLE ALLEN G. SORENSEN, JUDGE, PRESIDING

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is a criminal case in which the appellant was convicted of distributing for value a controlled substance in violation of Utah Code Ann. § 58-37-8(1)A(a)(ii) (1953).

DISPOSITION IN THE LOWER COURT

On July 2, 1975, the defendant-appellant was tried to a jury before the Honorable Allen B. Sorensen, and found guilty of the offense of unlawful distribution of a controlled substance for value.

RELIEF SOUGHT ON APPEAL

Respondent, the State of Utah, seeks affirmation of

the trial court's decision overruling defendant-appellant's motion for a new trial.

STATEMENT OF FACTS

The testimony at trial indicates that the following events transpired:

The appellant was tried and found guilty by a jury on July 2, 1975, for the offense of unlawful distribution for value of the controlled substance, lysergic acid diethylamide (LSD) to the State's chief witness, Mary Lee Bosh.

Mary Bosh testified in substance as follows: she was employed by Region Four Narcotic Task Force, and in the course of her employment met with police officers at the Region Four Task Force office in Provo, Utah, on January 2, 1975. At this time she was searched, as was her car (Tr. 10,11). No drugs were found on her person or in her car (Tr.18,20). She was then given money by the police officers with which to purchase drugs, which purchase she had previously set up. She left this meeting and met Karen Davis, who directed her to the Provo Western Motel, where the defendant sold Mary Bosh three squares of "acid" for ten dollars. She thereupon left the motel, took Karen Davis home and met with police officers, there delivering to them the "acid." (Tr. 11-13).

Mary Bosh further testified that she was a confidential informant for Region Four Narcotics Task Force, and was paid a commission based on how much money she spent for each buy.

Other witnesses for the State corroborated the testimony of Mary Bosh as it related to the times prior to entering the motel and after returning to the police (Tr. 18,20). They also testified that the "acid" was delivered by Officer Phil Johnson to Dr. Wesley Parrish for testing (Tr.7). Mary Bosh turned the acid over to Officer Johnson (Tr.23). Examination and testing of the substance revealed that it was lysergic acid diethylamide (Tr.8).

Karen Davis testified that during the time Mary Bosh was in the motel with them no one sold her anything (Tr.26). The defendant denied giving Mary Bosh any "acid" (Tr.30), although Karen Davis admitted that drugs changed hands in the motel room (Tr.26).

The defendant subsequently submitted an affidavit of bias on the part of a juror. The affidavit alleged that a juror was a supervisor where the defendant formerly worked, and that the defendant did not recognize this juror until a recess in the trial when he (juror) was pointed

out by defendant's mother. The affidavit also states that the defendant never informed his attorney of his former relationship to the juror until subsequent to the trial. Also stated in the affidavit is the allegation that this juror at least on one occasion reprimanded the defendant while both were working at Spanish Fork Foundry (R.17,18).

The record does not contain the voir dire examination, so it is not within the record as to whether the juror was asked of this relationship or not.

Defendant's motion for a new trial was overruled by the trial court.

Judgment was pronounced in December, 1975 (R.13).

ARGUMENT

POINT I

THE DISCRETION OF THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL SHOULD NOT BE DISTURBED SINCE NO ABUSE OF DISCRETION RESULTING IN PREJUDICE TO APPELLANT WAS SHOWN.

The rule in Utah is that the trial court has discretion to grant or refuse motions for new trials and that appellate courts will not disturb such trial court rulings unless an abuse of discretion, resulting in prejudice to the defendant, is shown. State v. Weaver,

78 Utah 555, 6 P.2d 167 (1931); State v. Draper, 83 Utah 115, 27 P.2d 39 (1933).

Appellant was convicted by a jury, and the trial court refused to disturb this verdict. Arguments for a new trial were heard by the trial court, resulting in a denial of appellant's motion for a new trial (R.19). It is apparent the trial court did not feel that sufficient grounds existed for a new trial; thus, no disturbance of the jury's verdict. This follows the rule of law in Utah set forth in State v. Kelbach, 23 Utah 2d 231, 238, 461 P.2d 297, 301 (1969):

> "This court may not interfere with a jury verdict, unless upon review of the entire record, there emerges errors of sufficient gravity to indicate that defendant's rights were prejudiced in some substantial manner, i.e., the error must be such that it is reasonably probable that there would have been a result more favorable to the appellant in the absence of error."

Appellant has not shown an abuse of discretion by the trial court in denying the motion for a new trial. Even if error were shown, it would have to be such " . . . that it is reasonably probable that there would have been a result more favorable to the appellant in the absence of error." State v. Kelbach, supra.

The record in this case does not reflect error. Appellant alleges in his affidavit that he was employed, prior to his trial, at Spanish Fork Foundry. He also alleges that one of the jurors was a supervisor at Spanish Fork Foundry, and that on one occasion he (appellant) was reprimanded by this supervisor (juror) (R.17). Appellant alleges in his brief that the juror did not make these facts known at voir dire. (There is no way of determining this, since the voir dire in this case was not made a part of the record.) The affidavit does not establish that the juror in question was appellant's supervisor, nor does it establish the relationship, if there was one, between the appellant and the juror in question. Appellant's affidavit alleges a poor work record while he was employed at Spanish Fork Foundry, but there is no showing that the juror-supervisor knew of appellant's poor work record.

No bias is shown by the record in this case, nor is any probability of bias shown. The trial court did not, therefore, abuse its discretion in denying appellant's motion.

POINT II

THE RELATIONSHIP OF MASTER-SERVANT WAS NOT ESTABLISHED AS GROUNDS FOR A CHALLENGE FOR IMPLIED BIAS PER UTAH CODE ANN. § 77-30-19(2) (1953).

Utah Code Ann. § 77-30-19(2) (1953), says in part:

> "A challenge for implied bias may be taken for all or any of the following causes, and for no other: . . . (2) Standing in the relation of . . . master and servant. . . ."

Appellant cites the above section and argues that a challenge could have been taken for implied bias had the juror's answers to voir dire revealed his relationship to the appellant. It is to be noted that the record does not reflect whether or not the juror was ever questioned on the matter during voir dire, and since the record does not disclose this, conjecture outside the record must not be a basis for appellant's argument.

Appellant's affidavit discloses only that he and the juror in question, Lawrence Knotts, had worked at the same time at Spanish Fork Foundry. There is no allegation that Knotts was appellant's supervisor.

More important, there is no allegation that appellant was in Knotts' employ at the time of the trial, nor is there any allegation that any relationship, including that of master-servant, existed between Knotts and appellant at the time of the trial.

It is true that generally, the relation of master and servant or employer and employee between a party to an action and a prospective juror will serve as sufficient grounds for a challenge for cause. 47 Am.Jur.2d 869, § 326. Cases have held, however, that where a juror was formerly employed by a party to an action, and such employment no longer exists, an objection to the juror's competency will not lie. Walter v. Louisville R. Co., 150 Ky. 652, 150 S.W. 824 (1912).

Appellant failed to establish the relationship of master-servant at the time of the trial, and therefore was not entitled to challenge the juror for implied bias under Utah Code Ann. § 77-30-19(2) (1953).

POINT III

FAILURE OF APPELLANT TO RAISE POSSIBLE VALID OBJECTION, WHEN HE DISCOVERED DURING TRIAL POSSIBLE GROUNDS FOR OBJECTION TO JUROR, CONSTITUTED A WAIVER OF ANY SUCH OBJECTION.

Appellant's affidavit (R.17) states that he did not recognize Lawrence Knotts until a recess in the trial when he was pointed out by appellant's mother, and that appellant never informed his attorney of this relationship to Lawrence Knotts until subsequent to the trial.

The well recognized rule of law in most jurisdictions holds that if knowledge of the disqualification of a juror is acquired after the jury is sworn, but before verdict, a failure to make objection at the time will amount to a waiver of the right to a new trial on that ground. Queenan v. Territory, 11 Okla. 261, 71 P. 218, aff'd 190 U.S. 548, 47 L.Ed. 1175, 23 S.Ct. 762 (1901); Kelly v. Gulf Oil Corporation, D.C. Pa., 28 F. Supp. 205, aff'd C.C.A., 105 F.2d 1018 (1939).

This rule of law is followed in Utah. Browning v. Bank of Vernal, 60 Utah 197, 207 Pac. 462 (1922). In Browning, one of the jurors sustained the relationship of debtor to the Bank of Vernal (defendant-appellant). Upon voir dire examination, the juror failed to disclose this relationship. It appeared that the assistant

cashier of the bank had personal knowledge of the relationship of the juror to the bank, was present in court at the time of the examination of the jurors respecting their qualifications as jurors, and did not advise appellant's counsel of the fact of the relationship. The Court denied appellant's motion for a new trial and said:

> "The fact that a juror sustains the relationship of debtor or creditor to a party to an action does not disqualify the juror to act, but it gives to the litigant the right to challenge for cause such juror. That is a right that can be waived."

The Court further explained the law applicable to the case:

> "No matter how good one's cause of challenge may be, it is clearly waived where no objection is made when the jury is impaneled, especially when he knew the facts constituting the grounds of challenge. It must appear that neither the party nor his counsel had knowledge of the disqualification. . . . To permit appellant now to insist upon the disqualification of the juror as grounds for a new trial, when the fact of such disqualification was known to the officers of the appellant at the time of the trial, would be to permit litigants to trifle with the court."

Other Utah cases upheld the trial court's overruling a challenge to jurors for cause after completion of

the jury, holding that this right to challenge may be waived. State v. Lanos, 63 Utah 151, 223 Pac. 1065 (1924); Johnson v. Allen, 108 Utah 148, 158 P.2d 134 (1945).

State v. Draper, 83 Utah 115, 27 P.2d 39 (1933), which appellant cites, denied a motion for a new trial. The motion was made on the grounds that, after the verdict, it was discovered by defendant and his counsel for the first time that a juror, prior to being called in the box, had found and expressed opinions contrary to his statements on voir dire. The Court said that the showing was insufficient to order a new trial, and that the allegation was insufficient to justify the conclusion that the juror had prejudiced the case.

In the case at bar, appellant had knowledge during the trial, and before the verdict, of his former relationship to Lawrence Knotts. He did not bring this to the attention of his counsel until after the trial (T.17). The proper course of action, if any ground existed at all for discharge of the juror Knotts or for a new trial, would have been to inform his counsel,

and his counsel in turn informing the court. This was not done; therefore, any objection was waived by appellant.

As set forth in Union Electric Light and Power Co. v. Snyder Estate Co., D.C. Mo., 15 F.Supp. 379 (1936), parties litigant to a trial cannot gamble and trifle with the court:

> "If the objection now . . . has such merit as that because of it the verdict should be set aside, it would have supported a motion to discharge the jury before the verdict. A party cannot gamble with the possibility of a favorable verdict and then thereafter, when the verdict proves unfavorable, raise a question he might have raised before the verdict."

Appellant had knowledge, but took no action, thereby waiving his objection to misconduct or disqualification of the juror. Sun Life Assurance Co. of Canada v. Cushman, 22 Wash.2d 930, 158 P.2d 101 (1945); Nelson v. Hardesty, 205 Kan. 112, 468 P.2d 173 (1970).

CONCLUSION

The trial court did not commit error in denying the appellant a new trial and the judgment should be affirmed.

Respectfully submitted,

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