

1976

Utah v. Gill Thomas : Brief of Respondent

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14416

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GILL THOMAS,

Defendant-Appellant.

Case No. 14416

RESPONDENT'S BRIEF

APPEAL FROM THE JUDGMENT OF THE THIRD
DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE JUDGE PETER F. LEARY

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FILED

JUN - 4 1976

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IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GILL THOMAS,

Defendant-Appellant.

Case No. 14416

RESPONDENT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with distributing a controlled substance in violation of Utah Code Annotated (Supp. 1975), Section 58-37-8(1)(a)(ii).

DISPOSITION IN THE LOWER COURT

Appellant was tried, without a jury, in the Third Judicial District Court in and for Salt Lake County, Honorable Peter F. Leary presiding, on the 10th of December, 1975. Appellant was found guilty as charged and was sentenced to less than ten years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have appellant's conviction affirmed.

STATEMENT OF FACTS

On August 10, 1975, Police Officers Roberts and Mendez picked up Denise Giertz at her home and took her to the station. There she was strip-searched by Sandy Ellison (T-96). After the search, Miss Giertz was dropped off in Salt Lake and given \$150.00 with which to make a buy (T-5). Miss Giertz went to see appellant and upon finding him gave him fifty dollars in exchange for a package which was found to contain cocaine (T-11,92). Miss Giertz returned to the police car and was taken to the police station and again searched (T-94).

After picking up Miss Giertz but before returning to the police station, Officer Roberts received information of a possible robbery. He left Miss Giertz alone in Pioneer Park for a few minutes while he checked out the report (T-58,59). During that time Officer Roberts held the package and the remaining \$100.00 in his hand (T-59).

ARGUMENT

POINT I

THERE WAS NO ERROR IN ADMITTING THE TESTIMONY OF TWO WITNESSES WHOSE NAMES WERE NOT ON THE INFORMATION.

At trial the prosecution called two witnesses whose names were not listed on the information. Sandy Ellison testified that she searched Miss Giertz before and after the buy; and Donald Gunderson, a toxicologist, testified that the purchased substance was cocaine. Appellant claims error. Respondent submits that the information must include the names of all witness who testified at the preliminary hearing and thus, that the information in the present case was valid. Section 77-17-4, U.C.A. (Supp. 1975), is as follows:

"An information must recite the fact of the commitment of binding over of the defendant by a magistrate and the names of the witnesses testifying for the state on such examination must be indorsed thereon. (Emphasis added)."

The purpose of the information is to show that the court has found sufficient cause to hold or bind over a defendant for trial. The names of witnesses on the information are simply those upon who's testimony

the binding over rests. This is supported by reading Section 77-21-52, U.C.A. (Supp. 1975):

"When an information or indictment is filed, the names of all witnesses or deponents on whose evidence the information or indictment was based shall be indorsed thereon. . . ."
(emphasis added)

Since the names of all witnesses on whose evidence the information was based were in fact indorsed thereon, the information was valid.

The Utah Supreme Court has ruled that additional names of witnesses may be placed on an information at any time, even during the actual trial. State v. Redmond, 19 Utah 2d 272, 430 P.2d 901 (1967). The Court has also held that using witnesses not listed on an information, if error at all, is treated as any other error. That is, appellant, to prevail on appeal, must demonstrate prejudice as a result of the error. Otherwise, the error is considered harmless. State v. Redmond, supra, and State v. Kish, 28 U. 2d 430, 434, 503 P.2d 1208 (1972). Appellant claims prejudice in that he was surprised at trial and therefore unable to effectively cross-examine the extra witnesses. Respondent will show that there was no prejudice.

Almost every narcotics case includes an expert who testifies as to the identity of the "white powder". Surely appellant did not think that the state

would neglect an important element of proof. Logically speaking, if appellant actually believed that there were possible grounds on which to challenge the identity of the substance, he would have been prepared to make a challenge to prosecution evidence or to put on his own evidence as a defense. On the other hand, if appellant was not prepared, as he claims is the case, to attack identification testimony, the implication is that he was prepared to stipulate. As a matter of fact, appellant, at the preliminary hearing, stipulated to the testimony which Donald Gunderson was then prepared to offer. Obviously, appellant has failed to show actual prejudice from Mr. Gunderson's testimony.

The testimony of Sandy Ellison was also non-prejudicial to the defendant. She simply related that she searched Miss Giertz for money and drugs and found neither. Appellant conducted a vigorous and efficient cross-examination of this witness and thus protected his rights.

The major question to consider is whether or not a different verdict would have resulted if Miss Ellison had not testified. The answer is that the verdict would still have been "guilty". Even if there

had been no search, that fact would carry no more weight than the fact that Miss Giertz was outside of the officers view after the search, that she was left alone in Pioneer Park for a short time prior to the second search, or that she made the buy inside a house where the officers could not see her. The search was of little importance. Therefore, testimony of it certainly did not prejudice appellant. Since there was no prejudice, the error was harmless and appellant's conviction should be affirmed.

POINT II

THE TRIAL COURT WAS WELL WITHIN PROPER BOUNDS OF DISCRETION IN ALLOWING THREE WITNESSES TO MARK THE SAME DIAGRAM.

After the prosecution finished questioning Denise Giertz, defense counsel began his cross-examination. During that cross-examination, defense counsel had Miss Giertz make a diagram of the scene of the crime. The diagram included the streets and buildings in the area where the buy was made (T-22). The prosecution never asked Miss Giertz any questions pertaining to the diagram. The prosecution then called Officer Roberts to the stand. Officer Roberts was asked to take a look at the diagram Miss Giertz had made and to mark the location where he had dropped Miss Giertz off, where he had waited while she made the buy, and

where he later picked her up. Defense counsel objected to Officer Roberts using the same diagram, however, the trial court ruled that he could do so (T-56). Defense counsel then cross-examined Officer Roberts with respect to the diagram. The prosecution then called Officer Mendez and the same things transpired (T-71).

Appellant alleges that the trial court abused its discretion in allowing more than one witness to mark the diagram after the witness exclusion rule had been evoked. Respondent submits that the trial court was well within its discretion in ruling as it did. Furthermore, even if the trial court erred, there was absolutely no prejudice. Finally, since defense counsel also questioned three witnesses with the use of the diagram, thus doing the very thing he now condemns as error, he can not be allowed to complain of the error.

The Utah rule for excluding witnesses is found in Utah Code Ann. (Supp. 1975), Section 78-7-4:

" . . . in any cause the court may, in its discretion, during the examination of a witness, exclude any and all other witnesses in the cause."
(Emphasis added)

It is important to note that the statute says that the court "may" rather than the court "must" exclude witnesses. The Utah Supreme Court supports this construction. In State v. Bonza, 72 Utah 177, 269 P. 480 (1928), the court held that a trial court may refuse to grant a request to exclude and that there is no absolute right to have any witnesses excluded. Almost every other state has the same rule which is well exemplified by the Supreme Court of Colorado:

"Whether the exclusion is initially invoked and if invoked, what constitutes a violation thereof, and even if it be determined that there was a violation, what penalty should be imposed or whether the offending witness should be allowed to testify, are all matters resting within the sound discretion of the court." Hampton v. People, 171 Colo. 153, 465 P.2d 394, 399 (1970)
(Emphasis added)

See also: State v. Schoenberger, 216 Kan. 464, 532 P.2d 1085 (1975); State v. Dillon, 93 Idaho 698, 471 P.2d 553 (1970); State v. Kijowski, 85 N.Mex. 549, 514 P.2d 306 (1973); Gee v. State, 538 P.2d 1102 (Okla. 1975); and State v. Hargrove, 11 Or. App. 486, 503 P.2d 721 (1972).

Since it was within the judge's discretion whether to exclude the witnesses, it would certainly be within his discretion to allow them to use the same

diagram. Furthermore, the Utah Supreme Court has held that they will not disturb any decision within the discretion of a trial court unless there is a clear showing of arbitrary and capricious abuse of that discretion. State v. Chambers, 533, P.2d 876 (Utah 1975).

Even if the trial court erred there was no prejudice to appellant. Without a showing of prejudice the error is harmless and cannot be used to assault a conviction. State v. Winkle, 535 P.2d 82 (Utah 1975). An examination of the testimony of the three witnesses proves that their use of the common diagram was not prejudicial to appellant.

Defense counsel had Miss Giertz diagram the scene and mark where Officer Roberts had dropped her off and later picked her up (T-22). When Roberts testified he marked the diagram to show his version of where these things occurred (T-56). It is interesting to note that the witnesses disagreed on the location of the pickup (T-64). Obviously Roberts was not influenced by Miss Giertz's markings. Defense counsel used the diagram to prove that neither Officer Roberts nor Mendez could have actually seen the transaction take place. The diagram did so prove, and thus was effective, not prejudicial for appellant.

Finally, appellant alleges that Officer Mendez and Miss Giertz were unable to agree as to the details of the house, the clothing worn by different persons, and various distances. Appellant claims that this shows that the diagram was unduly suggestive (appellant's brief p. 5). There is a major fault in this reasoning. The fact of disagreement proves conclusively that the diagram was not suggestive. Also, the diagram had nothing on it to indicate the odor of clothes or details of construction. There was no prejudice in the use of the diagram.

Finally, defense counsel, himself, questioned three witnesses with the use of the same diagram. (T-22,63,76). Since he did the very thing which he claims is error, he should not prevail on appeal. State v. Fair, 28 Utah 2d 242, 501 P.2d 107 (1972).

Respondent submits that the trial court acted with proper bounds of discretion, that any error was harmless, and that appellant committed the same error, thus the conviction should be affirmed.

POINT III

THE STATE PROVED ITS CASE BEYOND A REASONABLE DOUBT.

In appellant's third point on appeal, he attempts to raise several doubts as to the weight to

be given evidence, credibility of witnesses, and possible theories of the case. Respondent submits that appellant completely misunderstands the purpose of appeal. The rule in Utah and almost, if not all, other jurisdictions is that the appellate court is obliged to view evidence in accordance with the trial courts finding of guilt. State v. Simpson, 541 P.2d 1114 (Utah 1975). Also the appellate court must view whatever inferences may be fairly and reasonably drawn from the evidence in the light most favorable to the jury verdict. Simpson, supra. As the Kansas Supreme Court said, an appellate court, upon reviewing the sufficiency of the evidence, examines that evidence which favors the verdict. It does not weigh the evidence, and if the essential elements of the charge are sustained by any competent evidence, the conviction should stand. State v. Pettay, 216 Kan. 555, 532 P.2d 1289 (1975). See also State v. Vigil, 87 N. Mex. 345, 533 P.2d 578 (1975), and Shafsky v. State, 526 P.2d 60 (Wyo. 1974).

The reason for this rule is because the jury, or trial court if there is no jury, has the responsibility of determining the facts of the case, of judging the credibility of the witnesses, and of weighing the evidence. The finder-of-fact can observe the facial

expressions, mannerisms, and tone of voice of witnesses and thus is in the best position to determine who is telling the truth or how much weight to give certain testimony.

For the above reasons, appellant's third point of error should be dismissed. Appellant had a full opportunity to present his case to the finder of fact. He was allowed to argue any theory he felt was necessary. He was given full freedom to cross-examine all witnesses and to point out any inconsistencies in their testimony. Appellant does not, however, have the prerogative to judge the case. His arguments and allegations concerning weight and credibility have no place before this court.

Appellant claims that when Miss Giertz was searched by Sandy Ellison, prior to making the buy, the search was improperly done. Looking at the evidence in the light favorable to the verdict, we must assume that the search was proper. There is much evidence to show that it was. Miss Giertz stripped and was thoroughly examined including hair, mouth, anus, and vagina (T-94,96).

Appellant claims that Miss Giertz was an addict and that the police put pressure on her to make

buys for them. This goes to weight, not admissibility. Appellant also claims Miss Giertz was hazy on her recollections. Again, this is a question of weight.

Finally, appellant claims that Officer Roberts probably made up a story about holding evidence in his hand while investigating a robbery. Again, this a a jury question of credibility. On appeal there is no choice other than to believe the Officer's story because of the verdict of the lower court.

CONCLUSION

There was no error in allowing two witnesses to testify whose names were not on the information. Furthermore, the trial court used proper discretion in allowing three witnesses to mark the same diagram. Finally, the State proved its case beyond a reasonable doubt. Respondent submits that appellant's conviction should be affirmed.

Respectfully submitted,

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