1977

State of Utah v. William N. Besendorfer, Jr. : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH in the interest of

BESENDORFER, William N., Jr. (02-07-57)

A person under eighteen years of age.

Case No. 14595

BRIEF OF APPELLANT

Appeal from an Order of the Second District Juvenile Court for Salt Lake County, State of Utah, the Honorable Regnal Garff, Jr., presiding.

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BRIEF OF APPELLANT

Appeal from an Order of the Second District Juvenile Court for Salt Lake County, State of Utah, the Honorable Regnal Garff, Jr., presiding.

STATEMENT OF THE NATURE OF CASE

This is an appeal from the Second District Juvenile Court's finding it has jurisdiction over Mr. Eisendorfer because he allegedly violated Section 76-5-103 (1)(a), U.C.A. 1953, as amended 1974, by assaulting and causing serious bodily injury to Kory Jackson.

DISPOSITION IN LOWER COURTS

On January 18, 1975, Kory Jackson signed a complaint in the Justice's Court of Salt Lake County, Precinct Number Two. (References to the Record on Appeal before the Utah Supreme Court will be cited as "R." followed by the page number "p." and line number "l." R.p.154). On July 14, 1975, Justice of the Peace Wayne Gunderson of said Justice's Court transferred the matter to the Second District Juvenile Court for Salt Lake County (R.p.152). The Juvenile Court intake worker recommended on July 28, 1975, that the case be closed because of the mutual nature of the fight, but on August 5, 1975, set the matter for hearing because Mr. Jackson claimed he had witnesses who would testify that he never swung at Mr. Besendorfer (R. backside of p. 158). On October 23, 1975, Referee Birrell found that Mr. Besendorfer had committed the alleged crime (R.p.135). On October 23, 1975, Mr. Besendorfer gave notice of appeal of the Referee's decision to the Juvenile Court. (R.p.148). On April 26, 1976, Judge Garff of the Juvenile Court found that Mr. Besendorfer had committed the alleged crime (R.p.135 and 136). From the April 26, 1976 order of Judge Garff Mr. Besendorfer appeals to this Court (R.p.132).

RELIEF SOUGHT ON APPEAL

Appellant William N. Besendorfer, Jr. hereby petitions the Utah Supreme Court to vacate paragraphs two

and three of the Findings of Fact and the resultant Order entered April 26, 1976, in the Second District Juvenile Court in this matter.

STATEMENT OF FACTS

On or about January 14, 1975, a basketball game was played at Granite High School between the Granite High School and Highland High School basketball teams (R.p.2, l.19-23). After the basketball game Bill Besendorfer, a student at Granite High School walked to a McDonalds restaurant parking lot (R.p.34, l.4-12) located adjacent to Granite High School (R.p.9, l.16-18). Subsequently Kory Jackson, a student at Highland High School, drove his automobile into said restaurant parking lot (R.p.3, l.1-2). Mr. Besendorfer made an obscene gesture toward the occupants of Mr. Jackson's automobile (R.p.3, l.29) which had been surrounded by fifteen to twenty Granite High School students who had encircled the automobile (R.p.3, l.26-27). Mr. Jackson, wearing his Highland High School letter jacket (R.p.8, l.12-14), got out of the automobile and asked, "What the fuck you doing?" (R.p.4, l.20-21). Mr. Jackson and Mr. Besendorfer walked to the rear of the automobile (R.p.5, l.16-18) where they engaged in a fight (R.p.37, l.1-6; p.51, l.30-32; p.77, l.4-9; p.92, l.32; p.106, l.24-32) which lasted half a minute (R.p.7, l.26).

ARGUMENT

POINT I. THE STATE OF UTAH DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. BESENDORFER COMMITTED THE CRIME OF AGGRAVATED ASSAULT SECTION 76-5-103(1)(a), U.C.A. 1953, AS AMENDED 1974, UPON KORY JACKSON.

To be properly found guilty of the crime of aggravated assault, the Court must have found "beyond a reasonable doubt" (Section 76-1-501(1), U.C.A. 1953, as amended 1973) that Mr. Besendorfer caused "serious bodily injury" (Section 76-5-103(1)(a), U.C.A. 1953, as amended 1974) to Mr. Jackson. Section 76-1-601(9), U.C.A. 1953, as amended 1973, states: "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death."

The only evidence regarding serious bodily injury was Mr. Jackson's testimony that: "Yes. I had a tooth repaired - capped. I had to go to the doctor's office for the bruises and that's about it." (R.p.7, l.30-31). With the foregoing the only evidence as to Mr. Jackson's injury the Juvenile Court erred in finding that Mr. Besendorfer caused serious bodily injury, as defined by our statutes, to Mr. Jackson.

Furthermore, Mr. Jackson, if not an instigator, at least consented to the fight. The record indicates Mr. Jackson was angered by the fellows who were rocking his car (R.p.10, l.8,23,24). Instead of driving the car away, honking his horn to attract help such as the State's witness Mr. Johnson (R.p.25, l.25-26) who was Mr. Jackson's school teacher and in the vicinity eating a hamburger at the time or remaining safely locked in the car, Kory Jackson got out of his car, became angry, and alone walked into a hostile group of fifteen to twenty people. (R.p.10, l.8, 23-24; R.p.11, l.25-28, l.31-32). It would be hard to imagine conduct more indicative of consent to enter a fight.

The case law throughout the nation generally supports the statement appearing in Clark & Marshall, Law of Crimes (6th ed. 1958), Section 5.14, p. 315:

> "In criminal law, as in civil cases, an act does not constitute an assault, or an assault and battery, if the person on or against whom it is committed freely consents to the act, provided he or she is capable of consenting, and the act is one to which consent may be given, and the consent is not obtained by fraud."

See also I Wharton's Criminal Law (12th ed.), Section 180, p. 233. The Circuit Court of the District of Columbia has put it very tersely: "Generally where there is consent, there is no assault." Guarro v. United States, (1956), 99 U.S.App. D.C. 97, 237 F.2d 578, 581.

Mr. Jackson's acts indicate his consent to the fight. Therefore, no assault occurred according to the better reasoned authority.

POINT II. THE JUVENILE COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT MR. BESENDORFER THE RIGHT TO IMPEACH THE TESTIMONY OF KORY JACKSON.

Kory Jackson was called by Mr. Besendorfer's attorney and declared by the Court an adverse witness (R.p.112, l.7-11). Mr. Besendorfer's attorney was questioning Mr. Jackson concerning prior statements made by Mr. Jackson to Juvenile Court Referee Birrell (R.p.112, l.26). The State's attorney objected (R.p.112, l.27). The Court erroneously sustained the objection (R.p.113, l.5).

Rule Twenty (20) of the Utah Rules of Evidence adopted February 17, 1971, by the Utah Supreme Court pursuant to Section 78-2-4, U.C.A., 1953, to become effective July 1, 1971, states: "subject to Rules 21 and 22, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling him may examine him and introduce extrinsic evidence concerning any statement or conduct by him and any other matter relevant upon the issues of credibility" (emphasis added).

Section 55-10-105, U.C.A. 1953, declares that Juvenile Court proceedings are civil proceedings. Rule 43(b) of the

Utah Rules of Civil Procedure states in part that: "A party may call an adverse party . . . and may contradict and impeach him in all respects as if he had been called by the adverse party, ..."

The cases decided by the Utah Supreme Court have followed the principles contained in the Rules cited above. Morton v. Hood, 105 Utah 484, 143 P.2d 434 (1945; Xenakis v. Garrett Freight Lines, 1 Utah2d 299, 265 P.2d 1007 (1954) and Schlatter v. McCarthy 113 Utah 543, 196 P.2d 968, rehearing denied 113 Utah 560, 198 P.2d 473 (1948).

Since Judge Garff's refusal to allow Mr. Besendorfer to impeach Mr. Jackson was in error, the next step is to determine whether it prejudiced Mr. Besendorfer's rights, Rule 61 of the Utah Rules of Civil Procedure, and Section 77-42-1, U.C.A., 1953.

Mr. Jackson was the only State's witness to identify Mr. Besendorfer as his alleged assailant and to describe the assault. (See R.p.13, l.5-6 - Mr. Newman could not identify Mr. Besendorfer; R.p.21, l.17-18, 26-29 - Mr. McLaughlin could not identify Mr. Besendorfer; R.p.28, l.2 - Mr. Johnson could not identify Mr. Besendorfer.) Therefore, the outcome of this lawsuit depended upon the crucial testimony of Rory Jackson.

In State v. Solantakis, 70 Utah 296, 259 P. 1044 (1927), the Utah Supreme Court held, "that the refusal of the

trial court to permit cross-examination of the state's witness was prejudicial to the rights of the defendant (Id. at 1047)." The Court further stated as reason for this ruling, "that the cross-examination of a witness may not only modify and explain, but it may destroy the evidence in chief (Id. at 1047)." Mr. Jackson sought the opportunity to destroy the State's case by impeaching the sole witness against him.

The Zolantakis Court further stated, "A Court is unable in advance to determine what will be the result of cross-examination in a given case. Legal procedure requires that the court hears before it condemns, . . . (Id. at 1047)." As stated by the Utah Supreme Court in Clark v. Los Angeles & Salt Lake R. Co., 73 Utah 486 at 502, 275 P. 582 at 588(1928), "All committed errors, of course, are not presumptively prejudicial. But, when the error is of such nature or character as calculated to do harm, prejudice will be presumed until by the record it is affirmatively shown that the error was not or could not have been of harmful effect, Jensen v. Utah Ry Co., (Utah) 270 P. 350."

The error made herein was "calculated to do harm" since the State's case depended on the judge's belief or disbeli of one witness, whose credibility should have been subject to close scrutiny, Gordon v. United States, 344 US 414, 73 S. Ct. 369, 97 L. Ed. 447 (1953).

Prejudice must be presumed unless the State can affirmatively show the error could not have been harmful (Clark, supra. at 73 Utah 502, 275 P. 588) for Mr. Jackson was not allowed to answer whether he had earlier testified he could not identify his assailant.

CONCLUSION

Because of the State's failure to prove the crime charged and the Juvenile Court's reversible error, the Utah Supreme Court should vacate the Juvenile Court's Findings of Fact and Order.

DATED this 24th day of January, 1977.

Respectfully submitted,

GORDON F. ESPLIN
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to the Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, this 13th day of January, 1977.