1976

State of Utah v. David Lewis Moore : Brief of Respondent

Utah Supreme Court

Darrell G. Renstrom; Attorney for Defendant-Appellant;
Jon Bunderson; Assistant County Attorney;

IN THE SUPREME COURT

IN THE STATE OF UTAH

- - - - - - - - - -

STATE OF UTAH,

Respondent,

-vs-

DAVID LEWIS MOORE,

Appellant.

Case No. 14607

BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellant was charged with the crime of possessing a controlled substance with intent to distribute the same, a violation of the Utah Code Annotated § 58-37-8 (1953).

DISPOSITION IN LOWER COURT

A jury found appellant guilty as charged before the Honorable Venoy Christofferson.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the conviction.

STATEMENT OF FACTS

Appellant was brought to trial on April 14, 1976. Sixteen jurors were called to be questioned. The prosecutor was given a chance to voir dire the prospective jurors and asked:

> "Is there anything in any of your minds that I haven't brought up that you think would prevent you from rendering a fair verdict in this case?" (T-23).

Thereafter Mr. Rock, a prospective juror answered:

> "I feel very strongly against people that use or sell narcotics. I don't know whether I could be fair or not." (T-23).

After a brief discussion the prosecutor said:

> "Okay. Well, perhaps defense counsel would go into this point a little more." (T-24).

The defense counsel did not go into the point but later challenged the juror for cause. The trial court denied the challenge since no foundation had been laid by the defense counsel (T-29,30). Mr. Rock never served on the jury which convicted appellant.

Defense attorney asked if any prospective jurors knew the prosecutor (T-26). Mr. Rhodes remained silent. Later at a lunch break Mr. Rhodes, who was then sitting as a juror, told the prosecutor, in the hearing of the defense attorney that he realized that he knew the prosecutor's father (T-34).

After that Mr. Rhodes said he was in a hurry but the prosecutor said "Well, there is some more evidence to be presented." (T-34). Later the prosecutor decided not to call one of his witnesses, which appellant alleges was an "apparent" attempt to patronize the juror (appellant's brief p. 5).

ARGUMENT

POINT I

THERE WAS NO ERROR COMMITTED BY THE TRIAL COURT IN JURY SELECTION.

Appellant challenged two jurors for cause. The trial court denied the challenges. Appellant now appeals that decision. Respondent submits that the decision of the trial court should be affirmed for any one of four reasons. A trial judge has broad discretion in which to make decisions concerning jury selection. Thus his judgment should be given great weight by the appellate court. Second, during his voir dire of the jury, appellant failed to ask any questions concerning his suspicions of two jurors. Thus, he failed to lay before the trial court any foundation upon which to base an objection of alleged bias. Furthermore, the decision not to ask any voir dire questions concerning possible bias was a strategy move by appellant. Therefore, any error was self-induced.

Finally, appellant has not carried his burden on appeal in that he has failed to show that any actual prejudice resulted from the trial court decision.

It should be first noted that a trial judge is granted broad discretion in handling a trial (Barber v. Calder, 522 P.2d 700 (Utah 1974)) and particularly as he conducts the selection of a jury (State v. BeBee, 110 Utah, 484, 175 P.2d 478 (1946)). The trial judge has the prime responsibility to determine facts and to judge the credibility of the statements made by prosective jurors. The judge has the opportunity of seeing the jurors, hearing their testimony, and noting the manner and demeanor of the jurors while under examination and thus, is in the best position to determine whether or not a challenge for cause is valid. It is much more difficult for an appellate court to make these determinations. Therefore, the judgment of the trial court must stand unless overwhelming reasons require reversal (BeBee, supra), which reasons are noticeably absent in this case. Particularly, appellant has failed to show any actual prejudice resulting from the lower court's decision (see discussion, infra, on p.9)

Secondly, appellant should not prevail on appeal for the reason that he failed to offer any proof, to

the trial court, that the jurors in issue were biased. In other words, appellant failed to offer any foundation or basis for his challenge for cause. Therefore the trial court had no option but to deny the challenge. It is well settled that the purpose of voir dire is to ascertain facts that may serve as a foundation for cause challenges (State v. Taylor, 9 Ariz. App. 290 451 P.2d 648 (1969) and Rogers v. Citizens National Bank, (Okla. 1962), 373 P.2d 256). The prosecutor first questioned the jury and asked if there was anything in any of their minds that would prevent them from rendering a fair verdict. Mr. Rock replied:

> "I feel very strongly against people that use or sell narcotics. I don't know whether I could be fair in a verdict or not." (T-23).

After some further conversation the prosecutor said:

> "Okay. Well, perhaps defense counsel would go into this point a little more."

Then the prosecutor asked Mr. Westley:

> ". . . do you feel that you could sit on this case, base this case or your decision in this case if you were called to this jury, on the evidence that is presented here?" (T-25).

Mr. Westley replied in the affirmative (T.25). Later, when appellant had a chance to voir dire he failed to ask either Mr. Rock or Mr. Westley any questions at all

concerning the answers they gave to the prosecutor. In other words, appellant didn't even try to prove actual bias to the trial court. Respondent submits that it is the duty of defense counsel, as an officer of the court to investigate and bring out any prejudicial feelings that may exist in the minds of the prospective jurors (Roberson v. State (Okla 1968), 456 P.2d 595). Since appellant did not attempt to show bias he failed to lay any foundation before the court for his challenge for cause. Thus the court had no choice but to deny his challenges.

Following is a transcription of the discussion in chambers beginning at the point where defense counsel challenges the jurors.

> "MR. RENSTROM: Your Honor, I would at this time challenge the sitting of Mr. Westley, juror number five, and also Mr. Rock, juror number 15. I think Mr. Rock is very vague about his prejudices and Mr. Westley subscribes apparently to the same thought as [Mr. Rock]. (Emphasis added)
>
> THE COURT: Now who is this, which one?
>
> MR. RENSTROM. Mr. Rock and Mr. Westley.
>
> THE COURT: Okay, correct.
>
> MR. RENSTROM: He is the one that said most of the gentlemen had prior experiences which seemed, quite honestly, on that part, to suggest he might have some prejudice." (T-28,29) (Emphasis added).

Obviously, as the emphasised portions, supra, demonstrate, even Mr. Renstrom was not completely certain about prejudices which the two jurors might have. Thus, the trial court makes the following statement:

> "THE COURT: Well, of course . . . I expected some inquiry there but I didn't hear anything." (T-29) (Emphasis added).

The prosecutor then objected to the challenge on the same grounds by saying:

> "MR. BUNDERSON: Well . . . if there is some problem, the defense counsel is entitled to voir dire to bring out and ask them the questions. [So far] there is no foundation for any objection here." (T-29) (Emphasis added)

Respondent submits that appellant had full opportunity to substantiate his suspicions concerning the alleged bias of the jurors, and thus to lay a foundation before the court on which he could make an objection. Failing to do this, the trial court had no recourse but to deny the challenges. A similar situation would arise if, during the state's direct examination, defense counsel had objected to a question without stating grounds. Obviously the trial judge could, and generally should, deny the objection.

Another reason for affirmation is that any error which resulted from the lower court's decision was induced by appellant as part of his trial strategy.

The Utah Supreme Court has recently held that an appellant may not claim as error any decisions made by the trial court which were invited or induced by the appellant as part of a strategy decision. (State v. Fair, 28 Utah 2d 242, 501 P.2d 107, 108 (1972), and see also State v. Schieving, 535 P.2d 1232 (Utah 1975)).

Any criminal lawyer knows of the various strategies available in jury selections. Volumns have been written on the subject. In the instant case appellant had a suspicion that one, and possibly two jurors may be biased. This suspicion was based on the jurors answers to questions asked by the prosecution on voir dire. Appellant knew that he could make one of two choices. One alternative was, during his own voir dire of the jury, to press the jurors for specifics concerning their possible prejudices, thus laying a foundation for a challenge for cause. The danger however, is that if pressed, the jurors may flatly state that they could be fair and impartial; then the trial court would deny a challenge. The second alternative would be to not ask any questions, challenge for cause, and hope that the trial court would dismiss the jurors on the basis of possible prejudices. Later, if the trial judge

denied the challenge, appellant felt he could have another chance on appeal.

Appellant, as his trial strategy, adopted the second alternative. However, there are problems with this coure of action. First, appellant thereby failed in his duty, as an officer of the court, to assist the trial judge in making a proper determination of the issue (Roberson, supra). Since appellant chose not to assist the court by laying a foundation for his challenge, he is now precluded from complaining of any error thereby resulting. The error, if any there be, is self-induced (State v. Fair, supra). Second, although he is trying to use his second chance on appeal, there is no more evidence of prejudice before this court now, than there was before the trial court. It still remains that there is no foundation for a challenge.

Finally, appellant has failed to show any actual prejudice as a result of the trial court's decision. Without a showing of prejudice, any error must be deemed harmless (State v. Winkle, 535 P.2d 82 (Utah 1975)). Appellant alleges that there was prejudice claiming that there is a possibility that he might have had a better jury and asking this court to speculate as to what would have happened if the trial court had granted his challenges. Respondent submits, on the other hand, that the question before this court is simply: was appellant tried by an impartial jury. The issue is not

whether he could have had a better jury or what would have happened if. . . . The Utah Supreme Court has said that it will not be convinced by "nebulous" assertions "without any substantial, believable or factual probative substance," such as those now made by appellant. (Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970)).

Respondent submits that appellant has utterly failed to show any prejudice as a result of the jury that actually tried him. First, there is no claim by appellant that he used all of his peremptories. Many courts hold that there is no right to appeal if a defendant fails to exhaust his peremptories (Stott v. State, 538 P.2d 1061 (Okla. 1975), and People v. Miller, 78 Cal. Rptr. 449, 455 P.2d 377 (1969), cert. den. 406 U.S. 971, 92 S.Ct. 2417, 32 L.Ed.2d 672). Therefore, this case is identical to State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973), wherein a defendant challenged a jury which challenge was denied. When the issue was raised on appeal the Utah Supreme Court held:

> "No claim is made by the defendants that by reason of the court's failure to excuse the prospective juror they were compelled to use a peremptory challenge they might have used to strike another prospective juror's name from the list." (514 P.2d at 532.)

Therefore the Court said:

> "Defendant fail to show that any prejudice resulted to them by reason of the court's failure to grant their challenge for cause." (Id.).

Respondent submits that the Bautista decision is controlling.

Secondly, there is no claim that any biased jurors actually sat on the jury, nor are there any facts that could conceivably be used to support such an allegation. Therefore there is no showing of actual prejudice. Appellant has merely raised possibilities of hypothetical prejudice and thus his conviction should be affirmed.

POINT II

THERE WAS NO ERROR CONCERNING DISCLOSURES OF RELATIONSHIPS BETWEEN PROSPECTIVE JURORS AND THE PROSECUTOR.

Appellant asked all prospective jurors if they knew the prosecutor. Mr. Rhodes replied negatively. Later, at the noon hour Mr. Rhodes accosted the prosecutor by saying that he now knew who the prosecutor's father was, and that he hadn't known before (T-34). The juror went on to say something to the effect of:

> "Aren't you ever going to be a doctor, or I thought you were going to be a doctor, or I thought you may be a doctor or something along those lines." (T-34).

In a discussion in chambers, when the subject was brought up, the prosecutor said that nothing else had been said. Thereafter the court denied the motion for mistrial which appellant had made. Respondent submits that the trial court's decision should be affirmed.

Appellant correctly states the law by saying that prospective jurors must fully, fairly, and truthfully answer all questions on voir dire examination, and must disclose any material information which might bear on their qualifications. The question was: Do you know the prosecutor? The answer was: No. Later on the juror realized that he did know the prosecutor's father. However, that knowledge fails to change the fact that the juror still did not know the prosecutor himself. Therefore, the juror honestly answered the appellant's question.

POINT III

THERE IS NO PROOF THAT THE PROSECUTOR PRESENTED HIS CASE IN A CERTAIN MANNER AS AN ATTEMPT TO ACCOMMODATE A JUROR.

During a noon break one of the jurors said to the prosecutor that he was in a hurry. The prosecutor replied, "Well, there is some more evidence

to be presented." That was the end of the conversation (T-34). Later, the prosecutor decided not to call one of his witnesses. Appellant speculates and hypothesizes that the prosecutor decided not to call that witness in an attempt to accommodate the juror. Of course, such speculation is not admissable as grounds for appeal. The Utah Supreme Court has held that it is not convinced by hypothetical, nebulous, and unsubstantiated assertions (Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970)). Even appellant admits that whether the prosecutor was deliberate in his actions, ". . . can never be known. . . ." (appellant's brief, p. 8).

CONCLUSION

Since appellant has shown no prejudice as a result of alleged errors, and since appellant's arguments consist primarily of hypothetical fact situations, respondent asks that appellant's conviction be affirmed.

Respectfully submitted,

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