1977

State of Utah v. Don C. Coffey : Supplemental Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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THE STATE OF UTAH,

Plaintiff and
Respondent,

vs.

DON C. COFFEY,

Defendant and
Appellant.

Appeal from
Fourth Judicial
Honorable

VERNON B. ROMNEY
ATTORNEY GENERAL, STATE OF UTAH
Attorney for Plaintiff and
Respondent
Capitol
Lake City, Utah 84114

CASES AND AUTHORITIES CITED:

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff and Respondent, vs. DON C. COFFEY, Defendant and Appellant.	:	Case No. 14710

SUPPLEMENTAL BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The defendant, Don C. Coffey, was convicted in the Fourth District Court, State of Utah, of issuing a back check in violation of Section 76-6-505, Utah Criminal Code.

DISPOSITION IN LOWER COURT

On May 24, 1976, the defendant-appellant was tried before a jury in Fourth District Court, the Honorable Allen B. Sorensen presiding, and was found guilty of a second degree felony.

RELIEF SOUGHT ON APPEAL

Defendant-appellant, Don C. Coffey, seeks vacation of the Judgment rendered in the Fourth District Court and a remand for a new trial.

STATEMENT OF FACTS

The undersigned counsel makes no particular quarrel with the Statements of Fact appearing in the Briefs of the Appellant and Respondent formerly filed in this matter, except for the second paragraph of the Public Defender, Mr. John G. Mulliner's Brief on behalf of appellant, which says:

> "The check was presented for payment and was dishonored. The Defendant did not have sufficient funds or credit with Dixie State Bank for payment of the check."

As will be noted hereafter, the undersigned believes the proper state of facts were that the defendant indeed stopped payment on the check in question, and the stipulation of Mr. Mulliner that appears in the record at page 6 (which also will be referred to in detail in the argument hereafter) did not admit that the check was presented and dishonored, but stipulated only that there were not sufficient funds or credits in the account of the defendant on July 29, 1975, to pay the check in question bearing the same date. Other facts or proffered evidence will be alluded to in the body of the argument.

ARGUMENT

THE PUBLIC DEFENDER'S FAILURE TO OFFER AVAILABLE DEFENSES DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

At the outset, it is admitted that counsel's neglect, irrespective of motive or consequence, is ordinarily binding upon his client. (Attorneys at Law, 7 Am Jur 2d 110.) Recent Utah cases adhere to the same rule and generally look with disfavor upon defendants who denounce their trial attorney as incompetent: Heinlin v. Smith, 542 P.2d 1081 (1975); Jaramillo v. Turner, 465 P.2d 343, 240 Utah 2d 19 (1970); Lopez v. Turner, 24 Utah 2d 23, 465 P.2d 345 (1970). In each of these cases, however, the defendant had originally plead guilty and sought to avoid the responsibility of his admitted act by claiming he was not advised as to the consequences of a guilty plea; and in each instance, the Court has viewed such claims as abortive attempts to subvert the law.

There is language in the Jaramillo and Heinlin opinions, for example, to the effect that a charge of incompetency is the last refuge of the guilty and that the Court views such claims with an implicit, if not actual, presumption in disfavor of the defendant. But the charge in each of these cases is, as the Court perceived, a frivolous "loophole" in light of previous admissions the defendant had made. In Heinlin, the defendant

asserted the incompetence of his counsel when he failed to move for the suppression of certain admissions made to the taking of a consent, yet confirmed the same admissions on the stand. Likewise, the defendant in Jaramillo claimed his lawyer did not advise him as to the consequences of a guilty plea, yet the beginning of the opinion quotes portions of the record which undeniably show that defendant's claim was a lie. No wonder the Court has been offended by such attempts.

Nonetheless, this Court has recognized an exception to the general rule quoted from Am Jur in Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969). In Alires the proffered evidence was that the petitioner had given counsel $100.00 for his defense, but was never further contacted until sentence was imposed, at which time counsel claimed that he did not recall receipt of any $100.00 and turned and walked away. The Court found that such failure of representation was a departure from due process and remanded the case. "The requirement" (of right to counsel), writes the Court, "is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interest of the accused." Here, unlike the cases previously cited, the defendant proffered certain facts, which if made known to a court or jury, may well have raised a reasonable doubt as to his guilt. It is submitted that the case at bar falls under the same ambit as the

Alires case and should be remanded for the same reasons:

From the record, there is indication that the public defender had given little, if any, preparation to the defendant's case, and certainly had given no thought to whether Mr. Coffey should or should not apply for adult probation once the verdict of guilty had been rendered. On page 21 of the record, for example, the Court says:

> "Do you have any request as to the time for pronouncement of judgment?
>
> Mr. Mulliner: "Your Honor, I have not discussed this with my client. I assume that we will want a referral to the adult probation." (Emphasis added.)
>
> The Court: "Discuss it with him and explain to him he has a right to have judgment pronounced in not less that four nor more than ten days. If he wishes if referred to the probation department, we will require considerably more than ten days. Go ahead and ask him."

It seems strange that Mr. Mulliner would not discuss the ramifications of a guilty verdict with the defendant when he made not even the slightest attempt to offer a defense. Had he discussed any defense with the defendant prior to trial? The record is silent on that question. But even a quick perusal of the record leaves the reader with unresolved anxiety and gnawing ambiguities:

1. Why, for instance, did Mr. Mulliner stipulate that as of July 29, 1975, there were not sufficient funds or credit in the account of Don Coffey to cover the check he had

written? (R. p 6.) It is submitted that such a stipulation does not prove whether the check was, in fact, refused by the bank (as required by the statute 76-6-505). Neither does it show whether there was any notice to the defendant that his account was overdrawn, that the check would not be paid (also as required by the statute) or whether the defendant ever made a subsequent deposit (Mr. Ercanbrack did, in fact, receive partial payment - R. 10.) or whether the defendant issued a stop-payment. Had he done so, the criminal statute would no longer be applicable. Why were these issues never raised at trial? Why was such a narrow and ambiguous stipulation never challenged or clarified? Why was the defendant never called to testify? Why did counsel neglect to offer any evidence whatsoever as to the conditions upon which the check was written or the reasons why it was not paid?

2. There were also at the time of trial significant testimony and defenses which could have been offered, but were not, on defendant's behalf, and only remotely hinted at during cross-examination. It is understood that "ordinarily an appellant may not raise new issues on appeal which were not presented to the trial court." Jaramillo, 240 Utah 2d 19, Holman v. Christensen, 73 Utah 389, 274 Pac 457 (1929). This court has overlooked the rule, however, in cases like Alires, where the

defendant on appeal proffered evidence in support of his claim. Likewise, in the instant case the defendant, in reliance upon his attorney, did not testify as he otherwise would have.

The facts as claimed by defendant are:

(a) That Ercanbrack was told to hold the check for a certain time until Coffey could arrange his affairs so that the check, when deposited, would clear;

(b) That Ercanbrack cheated the defendant by giving him "cull" or low-grade cherries, and by reason of that breach, was not entitled to the full amount of the check;

(c) That Ercanbrack eventually received a partial payment for the cherries;

(d) That Coffey deliberately refused payment on the balance of the original contract because he was cheated. The public defender never raised any of these facts; never called any of the witnesses which the defendant himself had arranged to testify in court, and never contradicted the testimony of the State's only witnesses.

3. Other jurisdictions which have considered the inadequacy-of-counsel issue, principally California, have relieved a defendant from the judgment of a trial court when counsel's lack of diligence or competence reduced the trial to a "farce or a sham." People v. Ibarra, 386 P.2d 287 (1963). In a nutshell, the context of Ibarra is that the defendant was

convicted of unlawful possession of heroin in the Superior Court of Los Angeles County. Defendant appealed on the basis that the public defender had failed to object to obviously inadmissible evidence allegedly taken from the defendant's person. The failure was not, as the court so found, merely a strategem, however inept such a move may appear, but the record showed that the public defender did not take the necessary preparation time to inform himself of defenses he could and should have otherwise asserted. Chief Justice Traynor, in writing for the majority, held:

> "Counsel's failure to research the applicable law precluded the exercise of judgment on his part and deprived the defendant of an adjudication of what was clearly the stronger of the two defenses available to him . . . Counsel's statement to the court makes perfectly clear that his decision reflects, not judgment, but unawareness of a rule of law basic to the case; a rule reasonable preparation would have revealed. Counsel's failure to object precluded resolution of the crucial factual issues supporting defendant's primary evidence. It thereby reduced his trial to a farce and a sham."

Both the Alires and Ibarra cases use the word "sham" in describing the trial. In the former case, the Utah Court remanded because counsel was unconcerned about the interests of his client and his appearance in the record amounted to a "sham and a pretense"; and in the latter case the trial attorney's lack of preparation in failing to make an obvious objection reduced the trial to a "farce and sham."

It is true that the facts of the case at bar do not show a complete failure of representation as in the Alires case. But the public defender's failure, in the case at bar, to call a single defense witness, though several were available, nor raise a single defense or even challenge the State's testimony, had the cumulative effect of denying defendant, Coffey, fair representation to a much greater extent than did counsel's failure to raise a timely objection in the Ibarra case.

There is no record in this case of a defense which could have been made, only implications that Mr. Mulliner had done little, if anything, to prepare. We submit, however, that that distinction is insignificant. In both Ibarra and the instant case, the public defender has seriously neglected his client's interest. Anyone reviewing the record in Ibarra could plainly see what the public defender should have done. In this case, the public defender's conduct or refusal to act is equally demonstrated by the record, and made glaringly deficient by the testimony proffered herein.

Counsel's neglect in the case at bar is no less serious because his proffered testimony is not explicit in the record. Indeed, the very reason Mr. Coffey and/or any of the defense witnesses he had scheduled did not testify was because Mr. Mulliner had not prepared, was not familiar with the defenses of the case and accordingly advised the defendant not to take

the stand. In reliance upon his attorney's advice, Mr. Coffey made no defense, which, it is submitted, could only leave the jury with the single and mistaken impression that no defense was available and that the testimony of the Ercanbracks was true. How could the jury possibly conclude otherwise? Even if the points Mr. Mulliner raises in his brief are correct, the fact remains that the defendant's trial was a farce and a sham.

CONCLUSION

Accordingly, for the foregoing reasons, the undersigned submits that the matter should be remanded for a new trial to permit the defendant his true day in court.

Respectfully submitted,

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