

1977

# State of Utah v. Michael Don Peterson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH

STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff and	:	
Respondent,	:	
	:	
vs.	:	Case No. 14,720
	:	
MICHAEL DON PETERSON,	:	
	:	
Defendant and	:	
Appellant.	:	

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

The Appellant, Michael Don Peterson, appeals from a judgment entered against him in the Fourth Judicial District Court of Utah, the Honorable George E. Ballif, presiding, following a conviction for Forcible Sexual Abuse.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty in June, 1976, of Forcible Sexual Abuse in violation of Utah Code Ann. §76-5-404 (1953) in that he, the said Michael Don Peterson, on the night of March 24, 1976, in Orem, Utah, touched the genitals of another and did otherwise take

indecent liberties with another, without the consent of the other, with intent to arouse or gratify the sexual desire of the said Michael Don Peterson.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction for Forcible Sexual Abuse and the matter remanded to the Fourth Judicial District Court for a new trial upon the grounds and for the reasons stated herein.

#### STATEMENT OF FACTS

On March 24, 1976, at approximately 9:00 p.m., Mrs. Sandy Murphy, a resident of Orem, Utah, was allegedly attacked sexually as she walked home from a church meeting. A man, later identified as Defendant, allegedly approached her from behind, put his hand over her mouth, pushed her to the ground, and put his hand up under her dress, coming into contact with her genitals, through her underwear. Mrs. Murphy screamed, a light went on in a nearby house, and the alleged assailant ran off. On the evening of April 7, 1976, Michael Don Peterson was approached by a police officer while walking westbound on 200 North in Orem. The police officer asked him for identification, found that he matched the description and the name of someone being sought for questioning, and asked him to

accompany him to the police station for that questioning. In the course of the evening, Defendant gave a statement indicating that he was the man who had attacked Mrs. Murphy, and that he had done so out of sexual desire. A competent psychologist testified in the trial, that Mr. Peterson's subnormal intelligence and desire to please, could have caused him to confess to a crime he did not commit.

#### ARGUMENT

##### POINT I

THE TRIAL COURT ERRED IN SUSTAINING THE OBJECTION OF THE PROSECUTOR TO DEFENDANT'S LINE OF QUESTIONING REGARDING THE ARREST PROCEDURE.

Plaintiff's second witness was Officer Terry Taylor of the Orem City Police Department. He was questioned as to how Mr. Peterson came to be in the Orem Police Station on the evening of April 7, 1976. His testimony was that he pulled along side of the Defendant as he was out walking, and asked him to produce identification, because he was looking for someone who fit the description of Defendant. His testimony was further, that upon finding that the Defendant matched the description and name of a person being sought, he was asked to go to the police station with the police officer, and did so willingly, an arrest not being made.

Subsequent evidence, adduced on cross-examination, shows that a police report was filed in the immediate case, showing that the suspect was a white male about 16 years of age, 6 ft. tall and clean shaven. It is apparent from that information, that the Defendant in this case did not match the description of the person being sought on this matter. Defendant is 24 years of age and has worn a mustache for years. Further questioning brought out the fact that Defendant was being sought regarding another matter. Counsel for the defense thereupon attempted to question Officer Taylor on whether the other matter was a felony or misdemeanor. An objection at that time was sustained. (TR 23). It is Defendant's position that the sustaining of that objection was prejudicial to Defendant's adequate defense. Defendant contends that there was an arrest at this time, and that no voluntary action on the part of the Defendant was responsible for his being present in the police station. If, of course, the Defendant was questioned and picked up because of a misdemeanor, as it is Defendant's information that he was, the questioning and detention of Defendant was illegal. §76-13-3 U.C.A. (1953) sets out the circumstances in which an arrest is legal. If a warrant has been issued it must be shown to the person arrested.

If a warrant is not used, the person must have committed a public offense in the Officer's presence, or there must be reasonable cause to suspect the person of a felony. It is very possible, that if questioning had been allowed to proceed along the line, it would have been brought out that Defendant was actually detained and questioned on the basis of misdemeanor reports, something that is patently illegal. It may well have further brought to light, that there was no reasonable cause whatsoever to suspect the Defendant of the crime in question in this instance. Defendant shortly after the objection, asked that the jury be dismissed and made a motion to dismiss. The trial court may well have been correct in failing to dismiss the case on the basis of the information it had, but it erred in not allowing the requested evidence in. There, of course, was a disagreement as to whether the Defendant was forcibly detained, but that entire question should have been decided only after the facts were in. If an illegal arrest was made, any evidence obtained as a result of it, including Defendant's statement, would be inadmissible, as the Supreme Court of the United States has ruled in Davis v. Mississippi, 349 U.S. 721 (1969).

## POINT II

THE TRIAL COURT ERRED IN ALLOWING DEFENDANT'S STATEMENT, GIVEN ORALLY, AND NEVER SWORN TO OR WRITTEN DOWN, TO BE ADMITTED AS EVIDENCE IN THE TRIAL.

The record of the trial itself, shows no objection or motions made in an attempt to keep out the Defendant's statement. This matter was, however, fully argued in a pre-trial hearing. Defendant, because of time limitations, and because of lack of knowledge as to what was contained in the trial transcript, has not ordered a transcript of the pre-trial hearing. If, however, the court deems it necessary to decide on this point, a copy can be ordered. Defendant's contention is that Defendant was questioned, only after an illegal detention, in that illegal pressure was put on the Defendant at that time. The police officers who were present at the time of questioning, admit to suggesting phrases to the Defendant, (TR 36) and to telling the Defendant that he might as well confess, because he could be identified with certainty by the victim. (TR 34). In fact, the information from the police report indicated that they were not at all sure that he would be so identified. This, then, was not mere questioning, but a concerted attempt to suggest to Mr. Peterson that he had done what they only vaguely

suspected he had done. Testimony introduced by Defendant (TR 73 - TR 79) indicates that the Defendant is in the lowest 11 1/2 % of the adult population in intellectual ability. The expert testimony also indicated that someone in this range of intellectual ability is more easily persuasable than is a normal adult. These items of evidence, when taken together, indicate that there is a distinct possibility of Defendant's will being overcome, and that indeed a confession to untruth may have been obtained. The Supreme Court of the United States, in Miranda v. Arizona, 884 U.S. 436 (1966), made it quite clear that the Fifth Amendment to the Constitution of the United States means exactly what it says. That is that a Defendant cannot be forced to testify against himself, and to be the main source of evidence against himself. Defendant, in this case, did not sign a written statement. His refusal to do so raises a distinct possibility that his refusal was based on its falsity. The means of obtaining information used here and the content of the statement are so suspicious and under contention, that the court should refuse to admit the statement and force the police to do what the constitution says they should do - prove the case without relying on Defendant to give them their evidence.



### POINT III

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL BASED UPON THE PREJUDICIAL MISCONDUCT OF THE PROSECUTING ATTORNEY ON CROSS-EXAMINATION.

In the course of the trial the County Attorney asked the Defendant's wife, a defense witness: "To your knowledge, has he (the Defendant, Michael Don Peterson) ever been convicted of a felony involving dishonesty?" (TR 71) Before Defendant's wife could answer the question, the jury was dismissed and counsel were invited into chambers. The prosecution, unable to find authority for such questioning, discontinued it.

Both the Utah Code Annotated and the Utah Rules of Evidence contain provisions relating to the above question.

Utah Code Annotated §78-24-9 provides: "But a witness must answer as to the fact of his previous conviction of a felony."

Utah Rules of Evidence, Rule 21, provides: "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility except as otherwise provided by statute."

The law is clear that such questioning is not proper, and the court supported the law. The problem,

however, is that the question was in before anything could be done, and it left the jury with an impression that the Defendant was indeed a dishonest person. No amount of warning to disregard the question, could erase the effect.

It is the duty of the Appellate Court to determine if such misconduct was prejudicial enough to result in a miscarriage of justice. At the outset, counsel has the duty to give the trial court the opportunity to correct an error before asking the reviewing court to reverse the verdict and judgment thereon. Pettingill v. Perkins, 272 P.2d 185, 2 U2d 266. It is to be noted that at the time counsel moved for a mistrial based upon prejudicial questioning that the court was evidently willing to instruct the jury to disregard the question or to otherwise correct or cure the misconduct. (TR 90) But the damage had been done. Surrounding jurisdictions have spoken to this very point. People v. Lyons, 303 P.2d 329, 47 C.2d 311, stated that where misconduct of the prosecuting attorney is of such character it cannot be purged of its harmful effect by an admonition, it will be considered as possible grounds for reversal in cases where no objection was made or admonition requested on behalf of the Defendant.

What is the influence upon the jury of the fact that the Defendant may have been convicted of past felonies? That is precisely the question. Misconduct of a district attorney does not merit reversal unless it is so flagrantly and obviously prejudicial that neither a retraction nor a rebuke from the court can destroy its influence, so holds a recent California case. People v. Seely, 171 P.2d 529, 75 C.A.2d 525; certiorari denied Seely v. Heinze, 68 S.Ct. 147, 332 U.S.819, 92 L.Ed. 396.

Most California decisions have held that such misconduct is grounds for a reversal where the misconduct may have turned the scales against the Defendant. People v. Lyons, People v. Carr, 329 P.2d 746, 163 C.A.2d 568; People v. Ford, 200 P.2d 867, 89 C.A.2d 467; In People v. Gibson, 332 P.2d 113, 165 C.A.2d 685 held that the court must resolve doubts in the Defendant's favor as to whether the alleged misconduct was prejudicial enough to have effected the conviction. While wide latitude should be permitted in cross-examination, it must not be extended to permit injection of a matter which is otherwise inadmissible. Buchanan v. Nye, 275 P.2d 767, 128 C.A.2d 582.

A recent Oklahoma case holds that a "conviction will not be reversed for alleged misconduct of a

prosecuting attorney asking incompetent questions on cross-examination unless the Appellate Court can see that the prosecuting attorney was guilty of misconduct influencing the verdict against the accused."

Bilbrey v. State, 135 P.2d 999, 76 Okl.Cr 249.

The mere mention of felony convictions, with or without instructions to disregard the question, couldn't help but influence the impaneled jury members.

#### POINT IV

NO EVIDENCE WAS PRESENTED THAT THE DEFENDANT "TOUCHED" THE PLAINTIFF'S GENITALS AND THUS ALL THE ELEMENTS OF THE COMPLAINT WERE NOT MET.

In answer to the question as to whether her genitals were actually touched, Sandy Murphy answered in the affirmative, but she continued: "It was, it wasn't under my underwear, but he was on top, you know. It was under my dress and my slip but not under my underwear." (TR 17) It was found that at all times there was a layer of clothing between the Defendant's hand and Sandy Murphy's genitals. (TR 17)

The Complaint is explicit. "...the said Michael Don Peterson,... touched the genitals of another..." No evidence was ever produced that he touched her genitals.

It is simply reasonable to assume that the legislature meant to prohibit actions which are more serious than a simple touching of another person through their clothing. This is borne out by the language of the statute which requires a touching of the anus or any part of the genitals. The anus, according to Webster's New World Dictionary, is "the opening at the lower end of the alimentary canal." It is significant that the legislature used the word anus, and not a word describing the entire buttocks. It is, of course, impossible to touch the anus without removing the clothing. It is clearly also impossible to touch the genitals, the actual sexual organs, without removing the clothing. Webster's New World Dictionary defines "touch" in the following manner: "1. To put the hand, etc. on. 2. To bring or come into contact with." It cannot seriously be argued that, even believing the alleged victim's story in its entirety, Defendant came into contact with her genitals. Jury instruction number 9, dealing with "touch" defined it as "to perceive by means of tactile sense, the tactile sense being perceptible by touch or relating to the sense of touch."

Defendant's requested instruction number 1, which instructs the jury that in order to find the Defendant guilty of the crime charged, that you must find that

he actually touched the genitals of Mrs. Murphy and did not simply touch her clothing" is an instruction that clearly states the legislative intent. That intent is not likely to be expressed in the instruction by the Court.

#### POINT V

THE TRIAL COURT ERRED IN NOT ADMITTING TESTIMONY REGARDING SPECIFIC BEHAVIOR OF THE DEFENDANT TENDING TO A CRIMINAL STATE. IT IS NOT WITHIN THE PURVIEW OF THE TRIAL JUDGE'S DISCRETION TO RULE ON RULE 47 EVIDENCE.

Utah Rules of Evidence, Rule 47 provides: Subject to Rule 48, when a trait of a person's character is relevant as tending to prove his conduct on a specified occasion, such trait may be proved in the same manner as provided by Rule 46, except that (a) evidence of specific instances of conduct other than evidence of convictions of a crime which tends to prove the trait to be bad shall be inadmissible, and (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged, (i) may not be excluded by the judge under Rule 45 if offered by the accused to prove his innocence, and (ii) if offered by the prosecution to prove his guilt, may be admitted

only after the accused has introduced evidence of his good character. Rule 46, which is referred to in Rule 47, states "when a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct, subject however, to the limitations of Rule 47 and 48."

In this instance, Defense counsel introduced evidence of Defendant's character trait of being a practical joker. Evidence was also introduced tending to show a normal sexual development and character. The evidence was in the form of opinion, evidence of reputation and evidence of specific instances of his conduct, and was testified to by members of Defendant's family. Webster's New World Dictionary defines character as: "a distinctive trait;" "one's personality;" "moral strength;" and "reputation." The evidence obtained in this matter was clearly proper, and was clearly relevant to whether his version of the facts should be believed. When, however, further evidence was attempted, the court sustained the prosecution's objection. (TR 82-85) Rule 47 clearly removes this matter from the Court's discretion, and it was prejudicial to an adequate defense, that the

questioning was stopped.

While this specific question has not, to the best of counsel's knowledge, been decided, Appellate Courts have held that relevant evidence must be admitted, even if it is weak. People v. Collier, 111 215, 295 P 898.

The Court erred in not allowing evidence which was crucial to Defendant's defense strategy.

#### CONCLUSION

The judgment of the trial court should be reversed, and the charges against Defendant should be dismissed. In the alternative, Defendant should be granted a new trial.

Respectfully Submitted,

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## OTHER AUTHORITIES CITED

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