1986

The State of Utah v. George Edward Christensen : Petition for Rehearing

Utah Supreme Court

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BRIEF

UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	20641
v.	:	
GEORGE EDWARD CHRISTENSEN, Defendant-Appellant	:	Case No. 20641

PETITION FOR REHEARING

Petition for reconsideration of a per curiam decision by the Utah Supreme Court filed May 1, 1986 in an appeal from a conviction and judgment imposed for Criminal Homicide, Murder in the Second Degree, a First Degree Felony, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

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STATEMENT OF THE CASE

This is a petition for rehearing of a per curiam decision filed by the Utah Supreme Court on May 1, 1986. Originally, this case was an appeal from a conviction and judgment imposed for Criminal Homicide, Murder in the Second Degree, a First Degree Felony, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

STATEMENT OF FACTS

The facts are set forth in the Brief of Appellant at 1-4.

ARGUMENT

In its per curiam opinion, State v. Stewart and State v. Christensen, 33 Utah Adv. Rep. 15 (filed May 1, 1986), this Court has overlooked and misapprehended issues of fact and law. Further, the Court has apparently violated its own rules in the issuance of the opinion.

POINT I

THE UTAH SUPREME COURT VIOLATED ITS OWN RULES IN THE ISSUANCE OF THE OPINION IN THIS CASE.

In this case, four Utah State Prison inmates were originally charged with criminal homicide arising from an incident at the prison (Appellant's Brief at 3). At the conclusion of the trial in the case two defendants were acquitted while defendants Stewart and Christensen were convicted by the same jury (Appellant's Brief at 4; R. 182-185). Separate appeals were filed by Stewart and Christensen. However, in its per curiam opinion, the appeals were consolidated by the Court.

Consolidation of appeals in the Utah Supreme Court is covered by Rule 3(b) of the Utah Rules of Appellate Procedure which states, in pertinent part:

> Individual appeals may be consolidated by order of the supreme court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

While Rule 3(b) allows the Court to consolidate appeals on its own motion, the rule does not address what notice of consolidation must be given to the parties. Notice and opportunity to be heard are the cornerstones of the concept of procedural due process. Notice and opportunity to be heard cannot discarded at the whim of any government agency, including a court. See, for example, Goldberg v. Kelly, 397 U.S. 254 (1970); Goss v. Lopez, 419 U.S. 565 (1975); and Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978). Indeed, Rule 23(b) of Utah Rules of Appellate Procedures states that motions for procedural orders may be summarily acted upon only when such motions "do not substantially affect the rights of the parties or the ultimate disposition of the appeal, . . . ".

In this case, no notice was given to the parties of the Court's intention to consolidate the appeals of Stewart and Christensen. Had such notice been given, Appellant Christensen would have vigorously opposed any consolidation. Appellant Christensen now contends that the consolidation substantially affected his rights and the ultimate disposition of his appeal. (See, Point II, infra). Therefore, the consolidation without notice should have never occurred and should now be rescinded.

A further violation of the Utah Rules of Appellate Procedure occurred when the Court filed its per curiam opinion before Appellant Christensen had an opportunity to submit a reply brief. Rule 26(a) of Utah Rules of Appellate Procedure provides, "a reply brief . . . may be served and filed by appellant within thirty (30) days after the filing and service of respondent's brief. . . ". In this case, the respondent's brief was filed on April 24, 1986 (Respondent's Brief at 9-10), according to Rule 26(a), Appellant Christensen had until May 24, 1986, to file a reply. Yet, this Court filed its per curiam opinion on May 1, 1986, over three weeks before the period to reply had expired. Since the appellant bears the burden of persuasion in this Court, he is afforded both the first and the last opportunity to meet that burden. Until the appellant has either filed a reply brief or waived the right to do so, the Court has not been presented with the full written argument in a case. The elimination of the appellant's right of reply is not only violation of the Court's own rules but of due process rights. It is not unreasonable to expect the Court to follow its own rules of appellate procedure. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

POINT II

THE PER CURIAM OPINION IN THIS CASE MISAPPREHENDED THE PRIMARY CONTENTION ADVANCED BY APPELLANT CHRISTENSEN AND OVERLOOKED AN ISSUE RAISED IN HIS BRIEF.

The primary contention advanced by Mr. Christensen in his opening brief was that the evidence was insufficient to convict him of second degree murder. Indeed, fully one-half of Appellant's opening brief was dedicated to an intensive review of the evidence with respect to Mr. Christensen. However, only one paragraph of the per curiam opinion contains a discussion of the evidence implicating Mr. Christensen. Further, contrary to the implication of the opinion that the jury simply disbelieved evidence advanced by the defense, much of the evidence reviewed in Mr. Christensen's brief was that of prosecution witnesses. These were the very witnesses the jury must have believed to have returned a conviction. Yet, the Appellant's opening brief demonstrates the lack of evidence presented by the prosecution to support a conviction. The opinion in this case clearly states that Stewart not Mr. Christensen carried the only knife capable of causing the fatal wound to the victim. State v. Stewart and Christensen, 33 Utah Adv. Rep. at 16.

Since, as the opinion in this case notes, Mr. Christensen did not inflict the fatal wound the victim, the only theory which would support a conviction would be that Mr. Christensen encouraged or aided in the commission of the offense. Utah Code Ann. §76-2-202 (1953 as amended). However, in his opening brief Mr. Christensen demonstrated that he was no more culpable than another co-defendant, Frank Dominguez, who was acquitted by the same jury. Dominguez also acted as an aider and abettor to the offense (Appellant's Brief at

12-13). Because of the obvious inconsistency of the jury's verdict, Appellant Christensen contended that the jury's verdict was irrational and should be overturned (Appellant's Brief at 13-16). However, the opinion in this case does not address this issue.

Where the evidence is the same against multiple defendants, some courts have held that a verdict convicting some defendants while acquitting other defendants is irrational and inconsistent and must be overturned. See, for example, People v. Angelopoulos, 86 P.2d 873 (Cal. 1939); State v. Gager, 370 P.2d 739 (Haw. 1962); State v. Hirsch, 131 N.E. 2d 419 (Ohio 1956); People v. Beasley, 353 N.E. 2d 699 (Ill. App. 1976); and People v. Fallon, 432 N.Y.S. 2d 225 (App. Div. 1980). In other cases considering this problem, the consensus seems to be that so long as the evidence against the convicted defendant is greater than that against the acquitted defendant, the verdict is not irrational. Pyrdol v. State, 617 P.2d 513 (Alaska 1980); State v. Remington, 515 P.2d 189 (Or. 1973). This is apparently an issue of first impression in Utah.

In the present case, the testimony of the pathologist and others indicated that neither Mr. Christensen nor Mr. Dominguez was responsible for the fatal blow to the victim (Appellant's Brief at 13). However, the evidence substantiates that both of these defendants were involved in some sort of attack upon the victim. The question is whether or not the evidence was stronger against Mr. Christensen, or whether in fact "the evidence in effect is in every respect the same against" both defendant Christensen and defendant Dominguez. Obviously, the evidence against Mr. Christensen and Mr. Dominguez was not exactly the same. However, exactness is not

necessary, only that the evidence is "in effect in every respect the same."

Summarizing the evidence, both defendants had weapons and both attempted to accost the victim in the bathroom of K dorm (T. 665-677). However, defendant Dominguez had a motive in wanting to harm the victim since he had been accused of stealing and attacked by the victim earlier in the day (T. 359). Mr. Christensen had no such prior involvement.

Both defendant Christensen and defendant Dominguez were identified by a prosecution witness at trial as "flailing" with weapons on the victim while he was on the ground outside of C dorm (T. 211, 236). However, shortly after the incident when questioned by police, the witness made no mention of Mr. Christensen and only remembered seeing defendants Dominguez and Stewart and Stewart's brother at this time (T. 236). The witness' testimony about a conversation in maximum security where he allegedly heard defendant Christensen assuring defendant Dominguez because they had worn gloves, (T. 223) would be equally incriminating for both defendants. (Because of space limitations, the evidence cannot be extensively reviewed here; for a complete review, see Appellant's Brief at 6-16).

Considering and weighing all the evidence against both Mr. Christensen, who was convicted, and Dominguez, who was acquitted, favors neither over the other. Rather, both were equally culpable and the "evidence in effect is in every respect the same against" both of them. The jury found the evidence insufficient to convict Dominguez of second degree murder. Therefore, the evidence must

also have been insufficient as to Mr. Christensen. To have found otherwise in light of all the evidence was inconsistent and irrational and, therefore, the verdict must be set aside.

CONCLUSION

Because Mr. Christensen's rights were substantially affected by the consolidation of his case with that of co-defendant Stewart, Appellant Christensen respectfully requests that this Court withdraw that portion of the opinion which affirms his conviction and consider his case on its individual merits. Further, Appellant Christensen respectfully petitions this Court to reconsider the substantive issues presented by his appeal and reverse his conviction and remand his case for a new trial or dismissal.

Respectfully submitted this ___ day of May, 1986.

ANDREW A. VALDEZ
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, ANDREW A. VALDEZ, hereby certify that I delivered four copies of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this ___ day of May, 1986.

CERTIFICATION

I, ANDREW A. VALDEZ, do hereby certify the following:

(1) I am the attorney for appellant/petitioner in this case and;

(2) This Petition for Rehearing is presented to this Court in good faith and not to delay any matter in this case.

Respectfully submitted this ____ day of May, 1986.

_____
ANDREW A. VALDEZ
Attorney for Appellant/Petitioner