1986

State of Utah v. Douglas Carter: Answer to Petition for Rehearing

Utah Supreme Court

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Thomas H. Means; Attorney for Appellant.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	)	
Plaintiff/Respondent,	)	**ANSWER TO PETITION FOR REHEARING**
v.	)	
DOUGLAS CARTER,	)	Supreme Court No. 860063 Category No. 1
Defendant/Appellant.	)	

Appeal from the Fourth Judicial District Court
Utah County, State of Utah
Honorable Cullen Y. Christensen

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v	)	
DOUGLAS CARTER,	)	No. 86063 Category No. 1
Appellant.	)	

STATEMENT OF **THE ISSUE**

The issue in this Answer is as set forth in Respondent's Petition for Rehearing.

STATEMENT OF THE CASE

The current status of this case is as set forth in Respondent's Petition for Rehearing.

STATEMENT OF THE FACTS

The facts relevant to said Petition and this Answer are as set forth in Respondent's Petition for Rehearing.

SUMMARY OF THE ARGUMENT

The opinion originally issued in this matter correctly mandates that the State should be prevented from making reference to the Section 76-5-202(1)(q), Utah Code, aggravating factor in the penalty trial on remand because of the principal of res judicata. This Court did not misconstrue or overlook material facts, statutes, or decisions, or base its original decision on some wrong principal of law, or misapply or overlook something which materially affected its original decision. The original opinion should therefore not be reconsidered or reheard.

ARGUMENT

AT THE REMANDED PENALTY TRIAL, PRINCIPALS OF RES JUDICATA PREVENT THE STATE FROM INTRODUCING EVIDENCE, REQUESTING JURY INSTRUCTIONS, ARGUING, OR OTHERWISE RE-LITIGATING WHETHER APPELLANT'S ACTS WERE COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS, CRUEL, OR EXCEPTIONALLY DEPRAVED MANNER.

Respondent recognizes that the original jury in this case was misinstructed at both the guilt and penalty phases as to the meaning of the Section 76-5-202(1)(q) aggravating factor. Nevertheless, Respondent argues that at the remanded penalty trial it should be allowed to introduce evidence relevant to such

aggravating factor, properly instruct the new jury on its meaning, and re-argue the identical issue litigated at the original guilt and penalty trials because Section 76-3-207(2) does not preclude introduction of such aggravating factor but rather allows introduction of "any matter the court deems relevant to sentence, ..." The State argues that it could have chosen to allege and prove any one of the statutory aggravating factors of Section 76-5-202 while reserving any other one or more of such aggravating factors for use at the penalty phase. The crux of Respondent's argument is that the State does not need to properly prove an aggravating factor beyond a reasonable doubt at the guilt phase as a prerequisite to use of the same factor at the penalty phase.

Respondent may well be correct in this interpretation of its parameters under Section 77-3-207(2). It appears that the section probably does not specifically prevent the state from arguing an aggravating factor that it did not allege or attempt to prove at the guilt phase. And, the aggravating factors of Section 76-5-202 are specifically designated as aggravating factors for purposes of sentencing, as well. It appears that had the State only alleged and put on evidence as to one aggravating factor, Section 76-3-207(2) would not have directly and independently prevented it from introducing evidence on and arguing an entirely different aggravating factor at the penalty phase.

However, Respondent argues principals that apply to circumstances which are not relevant to the present status of the case. The State is not now attempting to argue an aggravating factor that was reserved or "held back" from the original guilt or penalty trials. Rather, Respondent urges that an issue that it has previously and vigorously argued and lost should be re-litigated on remand. Had the State - in both the original guilty and penalty trials - not introduced evidence, requested instructions, and argued the identical issue, its position in the Petition may be well taken. But the State is now attempting to argue for the use and application of the 76-5-202(1)(q) aggravating factor as if for the first time. And, the principals of res judicata prevent the State from introducing and arguing what the statutory law would otherwise allow.

"Although the concept of res judicata and collateral estoppel originally developed in connection with civil litigation, they apply in criminal as well as civil cases;" 21 Am Jur 2nd 560, section 321, citing cases including Hoag v New Jersey, 356 US 464 and State v Erwin, 120 P2nd 285. This Court has previously determined that the principal of res judicata is comprised of two separate concepts, ie: claim preclusion and issue preclusion, Searle Bros. v Searle, 588 P2nd 689, Penrod v Nu Creation Creme,

Inc., 669 P2nd 873, Noble v Noble, 761 P2nd 1369, and Madsen v Borthwick, 769 P2nd 245. This Court has likewise ruled that-

> Under the rules of issue preclusion, the adjudication of an issue bars its re-litigation in another action only if four requirements are met. First, the issue in both cases must be identical. Second, the judgment must be final with respect to that issue. Third, the issue must have been fully, fairly, and competently litigated in the first action. Fourth, the party who is precluded from litigating the issue must be either a party to the first action or a privy of a party. Madsen, supra.

It seems clear that the "heinous/atrocious" issue as well as the parties in the original trial are identical to those in the trial on remand and that the "heinous/atrocious" issue, being central to the capital charge as well as to the determination of sentencing, was fairly and completely litigated in the former trials. What is not so clear is whether the issue has reached final judgment and whether the prior proceedings constitute "another action" as that term applies to the principal of issue preclusion.

The proper sentence to be imposed in this matter is, of course, not finally determined. However, whether or not Appellant committed an "heinous\atrocious" act has been finally determined by virtue of this Court's reversal of that part the verdict and judgment based on a finding that that aggravating factor had been committed. The State has already attempted and failed to establish the merits of that issue. This Court has previously ruled that a

claim is finally determined if decided on its merits, Madsen, supra. Finality for purposes of issue preclusion would seem to be best assessed by the same standards. If so assessed, this issue has reached final judgment.

This counsel has been unable to discover case authority bearing directly on the issue of whether Appellant's previous guilt trial constitutes "another action" viz a viz his upcoming remanded penalty trial, or whether guilt trials generally constitute actions which are considered separate from penalty trials, with respect to the principals of issue preclusion. However, if the underlying concept of issue preclusion is to preclude re-litigation of an issue which has been fully, fairly, and competently litigated by the same parties (as is the case here), then a strict adherence to an otherwise commonly recognized definition of the term would thwart the spirit of the principal. The emphasis should be on the fact that the State has already been afforded a fair opportunity to establish this same issue as against this same Appellant in another setting (the guilt phase). That the other setting does not have a different case number or isn't brought in a separate Information and thus may not constitute "another action" as that term is customarily used, should not be determinative.

CONCLUSIONS

The "heinous\atrocious" allegation against Appellant was fully, fairly, completely, and competently litigated between these same parties in a previous adversarial setting. While the directives of the relevant statutory law might otherwise seem to allow the State to introduce evidence on this same issue at the remanded penalty trial, principals of issue preclusion preclude the State from reasserting and protect Appellant from re-defending against the same issue. Correct application of the principals of issue preclusion to the facts of this case will not broadly nor improperly affect the State's claimed statutory right in other future cases to pick and "reserve" proof of aggravating factors for use in penalty phases, only. This Court has not overlooked or misapplied an issue of fact or law which would justify reargument, rehearing, or other modification of its original decision.

Dated this 5th day of July, 1989.

THOMAS H. MEANS
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 7th day of July, 1989, he/she served a true and correct copy of the foregoing document on the following by ~~depositing~~ delivering the same in the United ~~States mail with all postage and other fees pre-paid~~ to the following:

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