1948

The State of Utah v. Willie Dixon : Brief of Appellant

Utah Supreme Court

E. LeRoy Shields; Attorney for Defendant and Appellant;

In the Supreme Court of the State of Utah

THE STATE OF UTAH,

Respondent,

vs.

WILLIE DIXON,

Defendant and Appellant.

Case No. 7189

APPELLANT'S BRIEF

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CASES CITED

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STATEMENT OF THE CASE

The defendant was charged in an Information with the commission of the infamous crime against nature in violation of Title 103, Chapter 551, Section 22, Utah Code Annotated, 1943. The charging part of the information being:

> "That the said Willie Dixon on or about the 1st day of February, 1948, in the County of Tooele, State of Utah, did then and there wilfully, knowingly, unlawfully and feloniously commit an abominable and despicable crime against nature, to-wit, that the said Willie Dixon did then and there place his private part in the mouth of one Milton Vernell Stewart."

The charge grew out of an alleged offence committed by the defendant in the building in which the picture show was being conducted in what is known as Todd Park in Tooele County, Utah ,and the defendant was charged with the commission of the offense as set forth in the above referred to Information.

STATEMENT OF FACT

After the complaint was filed against the defendant, a preliminary hearing was had before Justice of the Peace F. W. Frailey, in Tooele City, Utah. At that time and as a basis of binding the defendant over for trial the young boy, Vernell Steward, who the record showed was but four years of age, having not yet reached his fifth birthday at the time of the commisison of the alleged offense, testified that the act was committed by the defendant in the toilet room of the building in which the picture show was being conducted and in the early afternoon of the date in question. The evidence will show that the toilet room is an open room and although partioned off in three stalls, only in one stall was a toilet bowl, and there was nothing but a two-by-four frame around the stalls so that a person could be seen from any position in the toilet room. The young boy testified that the act took place in this toilet room and at the preliminary hearing he was supported by three boys ranging from 11 to 13 years of age, to-wit, Richard Harris, Lorin Smith and Clifford Webb, and the evidence showed that the door into the toilet room had no latch on and had no catch on to hold the door shut, and this boy's testimony in the preliminary hearing was that while en-

gaged in the operation of the offense charged, the defendant stood with his back toward the door holding it so that it could not be opened, and that the three boys forced the door open and there found the defendant with his pants unbuttoned and with the small boy standing somewhere near him. Upon this testimoy the Justice of the Peace held the defendant to answer to the charge in the District Court.

When the case was tried in the District Court, the small boy and the three other boys testified that they had no knowledge of the commission of the offense in the toilet room, but that when they went in the toilet room the defendant went out and Vernell Smith, the small boy, went out also. That about a minute later they saw the two go around the corner a little to the west of the toilet room and they went and sat down on a bench in the outside hall and in about a minute the two came back out of the hall; that the defendant's pants were fully buttoned; that he had his hands in his pockets, but that the small boy was wiping his lips with his hands. All of these accusations were denied by the defendant.

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant and makes the following assignments of error upon which he will rely for a reversal of the judgment appealed from in this cause:

1. The Court erred in permitting the witness, Vernell Stewart, to testify over the defendant's objections as to the witness' qualifications to testify. (T. pages 7-9).

2. The Court erred in denying the defendant's motion for a directed verdict of not guilty.

3. The Court erred in permitting the verdict of the jury of guilty to stand against the defendant.

4. The Court erred in denying the defendant's motion for a new trial.

ARGUMENT

The first Assignment of Error is directed toward the court's permitting the witness, Vernell Stewart to testify over the defendant's objection as to his qualification to do so on account of his extreme immature age and as to his ability to do so. The State's Attorney in attempting to qualify him asked him, "Do you know what happens if a little boy tells a lie?" And he answered that question by saying, "Put in jail." To which the prosecuting attorney put this question, "He is punished for it, isn't he?" The court then interrupted by saying, "You said he was put in jail, did you, Vernell?" To which the witness answered "yes", and then the following questions were asked by the prosecuting attorney:

Q. You know what "to tell the truth", Vernell, means, don't you?
A. Yes.
Q. You know what you mean when you tell the Court you will tell the truth?
A. Yes.
Q. What would you do if you tell the Court you will tell the truth? You will tell the truth, will you?
A. Yes.

Upon the basis of this kind of questioning the prosecuting attorney concluded that the witness is competent to testify. (T. p. 6).

The defense attorney then asked him the following questions:

Q. Do you know what it means to take an oath when you raise your hand, son?
A. Unh-uh.
Q. You don't know what that means at all, do you? You say you will go to jail if you tell a lie. Do you know what would happen to you if you go to jail?
A. Uh-huh.
Q. What would happen to you?

At that time the Court interrupted him with the following statement:

You will tell Mr. Shields what you think would happen, Vernell, if you told a lie. What would happen to you? Do you know who Mr. Shields is, that man sitting out there that just asked you that question?
A. Here?
The Court: You see him. He has got a tie on that has some yellow in it.
A. Get put in jail.
Q. (By Mr. Shields) You say you would be put in jail if you told a lie. Would anything else happen to you if you told a lie? Nothing else would happen to you except you would be put in jail; is that right?
A. (Witness indicated the affirmative by a nod of the head.)
Mr. Shields: I don't believe he is qualified. (T. p 7)

The court then undertakes to examine the boy.

The Court then asked him when his birthday was, how old he was, what color has pants were, what color his shirt was, and then asked him if he has any friends and if so to name any boys that he plays with. To which he answered "Unh-uh."

The Court then followed by asking him if he would tell the truth if the Court asked him to tell the truth, to which he said, "Uh-huh." Then he was asked the following questions:

Q. Do you think you are a good boy or a bad boy if you tell the truth?
A. Bad boy.
Q. Do you think you are a good boy or a bad boy if you told the truth—if you told the truth would you be a bad boy or a good boy?
A. Good boy. (T. p. 7).

The Court then qualifies the witness and overrules the objection to his testimony. The Court then instructs the boy to stand up and be sworn, to which an objection was made by the defense attorney. (T. p. 9).

The witness then on direct examination stated that he saw the defendant on the day in question at the picture show, and when asked if he said anything to him at that time, answered, "Unh-uh." The boy then testified that the defendant wanted him to suck his pee pee for a dime, but that he didn't give him a dime, and then when asked what happened after he was asked to suck his pee pee, stated that the three boys pushed the door open and went into the toilet room, and that the defendant then left the bathroom and took him around the corner—it will be remembered that the three boys who

went into the toilet room testified that there was no such actions going on when they went in there. The witness then testified that he took him around the corner into the hall and there wanted him to suck his pee pee a little, and that he sucked it a little, and then he went back into the free show. (T. pages 11 and 12).

On Cross Examination, the following questions and answers were asked and received from the boy witness after stating that he and his father came to the Court House and to the Sheriff's Office:

Q. Let me ask you if, in that conversation you didn't say to the Sheriff that he didn't put his private in your mouth?
A. Unh-uh.
Q. Didn't you tell the Sheriff that?
A. (Witness nodded head in negative.)
Q. Didn't you tell the man you were talking to in the Sheriff's office, you didn't?
A. Who?
Q. That this man here, Mr. Dixon, didn't put his pee pee—that is what you call it, isn't it?
A. Yes.
Q. Didn't you tell the sheriff down there in his office, that he didn't put it in your mouth, when you and your father were there?
A. Unh-uh.
Q. What did you tell the sheriff about that? Do you remember?
A. Unh-uh.
Q. Don't remember—
The Court: What do you mean when you say "unh-uh"? What is your answer to that?
A. Don't know.

The Court: Do you mean "Yes" or "No", when you say that?

A. "No".

The Court: Say "No" instead of saying "Unh-uh"; or Yes" instead of saying "Uh-huh".

Q. (By Mr. Shields) Let me ask you this: Didn't you say down there, to the sheriff, in the Sheriff's office downstairs, that you didn't put his pee pee in your mouth, but you licked it?

A. Yes, I licked it.

Q. That is what you said to the Sheriff, wasn't it? Do you remember that?

A. (Witness nods head in the affirmative.)

Q. And that was the truth, wasn't it?

A. Yes.

Q. You remember saying that now, don't you?

A. (Witness nods head in the affirmative.) (T. pages 16 and 17).

The witness then testified that while in the toilet room, as follows:

Q. You came over here by him then, did you?

A. Yes.

Q. Then, Vernell, what did he do, or what did you do?

A. He wanted to let me suck his pee pee, and those boys was trying to get in.

Q. What boys was trying to get in?

A. Them over there.

Q. Those boys over there, all three of them?

A. Yes.

Q. You say he was holding it with his back towards it?

A. Uh-huh.

Q. And you were out in the door on this side of him; is that right?

A. Yes.

Q. And those three boys couldn't push that door open?
A. No. He took me around the corner, and they got in.
Q. Took you around what corner?
A. Around that corner.
Q. Tell me what corner?
A. Around by the back door.
Q. Can you tell me, on this drawing, where that door is?
A. Unh-uh, I can't.
Q. Was it outside of this toilet room?
A. Yes. He went outside, then turned over by the telephone, then turned the other way.
A. Down this hall here?
A. Yes; and there is a door that it takes you outside.
Q. The door is down in this place, down in here?
A. Yes.
Q. Did you go outside?
A. No.
Q. You stayed in this hall that goes over here?
A. Yes.
Q. Is this the hall that goes over to the picture show?
A. Yes.
Q. Then where did he go?
A. Then he went, and I went back to the free show.
Q. You left there and went back into the show, is that it?
A. Yes. (T. pages 21 and 22).

Lorin Smith testified that when they went into the toilet room he was buttoning up his pants, and that he was in front of the door; that is where the door would be and not by the two by four, and that would be right back from the toilet bowl in there, and that when they went in he was standing there buttoning his pants, that he didn't see his privates and nobody said anything to him at all. (T. p. 55).

He testified about the defendant and Vernell Stewart going around the corner into the hall, and that after they went out of the toilet room they could be seen from the sidewalk until they went around the corner the other way; that after they left the toilet room it was about a minute before the boys came out and at that time the defendant and Vernell Stewart were going around the corner and he was asked:

Q. Did you follow them around?
A. No.
Q. Why?
A. I don't know.
Q. You didn't suspect there was anything wrong going on ,did you?
A. No.
Q. There hadn't been anything happen at all that would cause you to suspect anything wrong was going on?
A. No.
Q. And you didn't see anything wrong at all, did you?
A. No.
Q. Not at any time?
A. No. (T. page 58).

And then again:

Q. You are positive he had a coat and hat on?
A. Yes.
Q. A cap and coat on; is that right?
A. Yes.
Q. Couldn't be any doubt about that?
A. No.
Q. Now when Mr. Dixon came around from the corner, where were his hands then?
A. In his pockets.

Q. In his pockets. His pants weren't unbuttoned, were they?
A. No.
Q. You saw them go around the corner when they came out of the toilet?
A. Yes.
Q. How long were they around the corner before they came back?
A. About two or three minutes.
Q. About two or three minutes. It might have been only one minute, mightn't it?
A. I don't think so.
Q. You don't think so. But it was a very short time, wasn't it?
A. Yes.
Q. And when they came around, Mr. Dixon had his hands in his pockets?
A. Yes.
Q. And his pants weer fully buttoned up?
A. I think so.
Q. And there wasn't anything about that that caused any alarm in your mind?
A. No; only that litle kid was spitting.
Q. Did that cause some alarm in your mind because the kid was spitting?
A. No.
Q. It is very often the case that kids spit, isn't it?
A. Yes.
Q. And you have seen them do it many times?
A. Yes.
Q. That didn't cause you any alarm, did it?
A. No.
Q. And he didnt say a word to you about anything when he came around there?
A. No. (T. pages 59 and 60.)

Certainly the three boys who were there didn't see anything that caused any alarm in their mind about anything that was going on, which, of course, leaves the small boy's testimony standing alone as to any commission of the offense charged in the Information and of which the defendant was convicted.

We now desire to call the court's attention to some authorities concerning this matter.

We, of course, do not believe that the testimony of the small boy was competent and inasmuch as there was no other testimony concerning the commission of the act at all, let us call the Court's attention to the law which definitely states that there must be a penetration of the private part into the mouth of the victim in order to constitute an offense. In suport of this theory, we call the court's attention to an Oregon case, State vs. Start, 132 Pac. 512 at 513:

> "It is said in Section 1539 L.O.L. that 'proof of actual penetration into the body is sufficient to sustain an indictment for rape or for the crime against nature. No particular opening of the body into which penetration can be made is specified in this section.
>
> It follows that the actual penetration of the virile member into any orifice of the human body except the vaginal opening of a female is sufficient for the establishment of the crime in question."

I now refer to 48 Am. Jur. at page 550, wherein the following is stated:

> "And when the crime of sodomy or the crime against nature is committed where the act consists of penetration of the mouth. As stated by one court in construing the statute on this subject, since no particular opening

> of the body into which penetration can be made is specified, it follows that the actual penetration of the virile member into any orifice of the human body except the vaginal opening of a female is sufficient for the establishment of the crime in question."

In State vs. McGruder (Iowa), 101 N.W. 646, it appears that the language of the statute defining "sodomy" includes penetration in any opening of the body other than the sexual parts.

In the case of Means vs. State, a Wisconsin case, 104 N.W. 815, it was decided under a statute which specifically provided that said crime may be committed by the penetration of the mouth.

In the case of Weaver vs. Territory (Arizona) 127 Pac. 724, it was held:

> "That a statute providing for any sexual penetration, however slight, would not sustain a conviction of sodomy where the act was committed by penetration of the mouth, yet it would seem that the better reasoning was with the court in the case of State vs. Start.
>
> This is the Oregon case hereinabove referred to.

In the case of Kinnan vs. State, 27 L.R.A. (N.S.) 478, it is said:

> Though there is a conflict of opinion on this question, weight of authority and the best-reasoned cases sustain Glover vs. State in holding that one may be convicted of the crime of sodomy or the crime against nature when the act is committed by penetration of the mouth.

In the case of State vs. Long, a Louisiana case, at 63 So. 180, is the following:

> "Whoever shall be convicted of the detestable and abominable crime against nature, committed with mankind, or with the mouth, shall," etc., was held sufficient when read in the light of the common law, and of the history of the crime of sodomy at common law, to sustain an indictment when the act was committed by penetration of the mouth.

There are a great number of cases along this line holding the same thing, and we cite them to show that in order that the crime of which the defendant is charged could be committed, there must be shown that there was a penetration of the mouth, and we find no case that relaxes this rule.

We, therefore, again refer to the testimony of the small boy, Vernell Stewart, as found on page 17 of the transcript, as follows:

Q. Let me ask you this: Didn't you say down there, to the sheriff, in the sheriff's office downstairs, that you didn't put his pee pee in your mouth, but you licked it?
A. Yes, I licked it.
Q. That is what you said to the sheriff, wasn't it? Do you remember that?
A. (Witness nods head in the affirmative.)

We repeat that this evidence is significant and is binding as to what happened, if anything happened, with this young boy and the defendant, and conclusively shows that there was no penetration into the mouth of the little boy at all, and in

absence of proof of penetration, we say that the evidence does not support a conviction of the defendant.

We desire to call the court's attention to the testimony of Mr. Dixon concerning what happened there that day contained in the transcript, pages 76 to 97, inclusive, and we say unequivocally that the evidence is not sufficient to convict the defendant of the charge layed in the information.

Now while we are fully aware of the law concerning competency of witnesses, we desire to call the court's attention to a few cases on that point. The statute of 1943, Section 104-49-2, under who may not be witnesses, is as follows:

> Sub-section (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

We submit that an examination of the testimony of this small boy brings him under the category above referred to.

In the case of State vs. Blyth, 20 Utah 378, this statute was referred to, and the court had this to say:

> "As will be noticed this provision of the statute does not apply to all children under ten years of age, but to such only as 'appear incapable of receiving just impressions of facts,' concerning the subject of inquiry, or of stating them truly."

And then it goes on to say:

> "When, therefore, objection is made to the competency of a child under ten years of age, it becomes a question addressed to the sound discretion of the trial

court, and the appellate court will not interfere, if the lower court, upon examination made upon its voir dire, or upon all of its testimony, concludes that the child is competent to testify, unless there is a clear abuse of discretion apparent from the record."

We submit that there was an abuse of discretion upon the part of the court in allowing this witness to testify, and that the record so shows.

In the case of Darneal vs. State of Oklahoma, 1 A.L.R. 638, we have the following:

> "He first contends that the court erred in permitting Rachael Garrison, a girl nine years of age, to testify as a witness against him. The statute of this state governing the competency of witnesses of tender age is as folows: "The following persons shall be incompetent to testify. . . . 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts representing which they are examined, or of relating them truly."
>
> It is apparent from the reading of the above statute that the question of the competency of a witness under ten years of age is a matter addressed peculiarly to the discretion of the trial court. If the trial court permits such a witness to testify, and it appears conclusively from the record on appeal that there has been an abuse of that sound discretion placed in such court, then this appellate court is authorized and will reverse a judgment of conviction upon such ground if it appears that the testimony of such witness was prejudicial to the accused."

Certainly one cannot examine this record of the testimony of this young boy, Vernell Stewart, without being impressed

with the fact that the court abused its discretion in permitting him to testify over the objection of the defendant. While it is true that the boy did a fairly good job with his testimony when being asked by the prosecuting attorney leading questions to which he could answer "Unh-uh" and "Uh-huh"' to, but we were never able to determine with such answers just whether he meant what the answers indicated or whether he actually knew what his answers meant, and the same result was obtained when the court attemped to coach him in his testimony when it did not appear that the prosecuting attorney was doing a very good job at the coaching with leading questions.

The case of the State vs. McMillan, 46 Utah 19 at page 22, it appears in that case that the girl in question was between 7 and 8 years of age, and the question of her ability was raised, and the court in holding that it was within the discretion of the trial court to accept the testimony of children under 10 years of age. The court still holds that if it is made to appear that the court abused its discretion in that regard, the supreme court may interfere with such action.

Also, the same holding in the case of State vs. Morasco, 42 Utah page 5 at page 8.

We submit that a careful reading of the record in this case would reveal that the court abused its discretion in permitting this boy to testify over the objection of the defendant, and while it is true that counsel and the court by asking leading questions, and suggestively, got some fairly good testimony from this young boy, yet upon his cross examination as heretofore referred to, he appeared as though a new light had

dawned upon him, and he very readily remembered what he had told the sheriff concerning the transaction in question, and we therefore submit that there is no evidence upon which a jury could bring in a verdict of guilty against the defendant in this case, and that the court should have granted the defendant's motion directing the jury to bring in a verdict of not guilty.

In going over this case I am very much impressed with the seriousness of the crime as I recall it carries a sentence in the state penitentiary up to 20 years. The defendant has lived at Todd Park for six or seven years, and has been around there, and the evidence shows with children on the play grounds, and there has been no evidence in all that time of any misconduct upon his part, and even in the face of such a record and in the face of the extreme lack of sufficient testimony to convict him of the offense, the court refused to consider the question of probation or parole for him and sentenced him to a term in the State Penitentiary.

We submit that the evidence does not support such a conviction or a finding, and that this court should reverse the conviction and either direct that the defendant be discharged or order a new trial of his case.

Respectfully submitted,

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