1948

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

Utah Supreme Court

Grover A. Giles; Attorney General; Herbert F. Smart; Assistant Attorney General;

In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

WILLIE DIXON,
Defendant and Appellant.

Case No. 7215

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The State agrees with appellant's statement of facts except:

1. There is no evidence in the record of any discrepancy in the testimony of the witnesses at the trial and at the preliminary hearing;

2. That the witness Vernell Stewart was five years of age on February 1, 1948 (the day the offense was com-

mitted) and would be six years of age in May, 1948 (Tr. P. 8). The trial was held April 13, 1948;

3. The boy, Vernell Stewart, testified on both direct and cross examination of the commission of the crime (Tr. P. 12 and 20).

ARGUMENT

Appellant's argument for reversal is based upon two contentions. One, that the witness, Vernell Stewart, because of his tender years should not have been permitted to testify; and, second, there is insufficient evidence of any penetration to constitute the crime of sodomy. We will dispell the arguments seriatum.

I.

The Court properly permitted Vernell Stewart to testify.

Section 104-49-2(2) U. C. A., 1943, provides:

> "The following persons cannot be witnesses:
> (1) Those who are of unsound mind at the time of their production for examination.
> (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.
> (3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding

claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding."

The witness was a boy three months short of six years of age, at the time of crime. At the trial he was examined by the attorney for the State, for the defense and by Court. In such examination, the witness testified that he knew what telling a lie was, and that if he told a lie he would be "put in jail," that he knew what to tell the truth was, and that he would tell the truth (Tr. P. 5 & 6).

As to his capability of receiving correct impressions and relating them, the Court asked his age, the color of his shirt and pants, the name of his father and mother, whether he knew whether he would be a good or bad boy if he told the truth (Tr. P. 8 & 9).

Since *State* vs. *Blyth*, 20 Utah 378, the rule in this state, as in other states, has been that where a child is under the age of ten, the test is whether the child is capable of receiving just impressions of facts or of stating them truly. *State* vs. *Morasco*, 42 Utah 5, 128 P. 571; *State* vs. *MacMillan*, 46 Utah 19; *State* vs. *Zeezich*, 61 Utah 61, 210 Pac. 927; *State* vs. *Williams*, 180 Pac. (2) 551.

In this jurisdiction, as stated in the above cited cases, and as counsel for appellant concedes, the question of competency of the witness is for trial judge who has the opportunity to observe and question the witness. His conclusion as to the competency will not be reversed unless there has been an abuse of the judicial discretion vested in him as trial judge.

Counsel for the State is impressed with the similarity of the case at bar with the case of *State* vs. *Morasco,* supra.

In that case, the witness was between five and six years of age. The questions propounded to that witness and the answers are remarkably similar to the questions and answers in this case. (See P. 7 of 42 Utah.) The Court in that case held that the witness was competent; in that case, also, the Court gave a cautionary instruction, referred to by the Court at page 9 of 42 Utah. Instruction No. 5 in the instant case is a cautionary instruction given to the jury by the trial judge.

We submit that under the authorities and the facts in this case, the Court did not abuse its discretion in permitting Vernell Stewart to testify.

II.

The evidence supports the conclusion that there was penetration sufficient to prove the crime of sodomy.

As in the crime of rape, any penetration, however slight, is sufficient to sustain a conviction. *Weaver* vs. *Territory,* 127 P. 724 (Ariz.).

In the case at bar, Vernell Stewart both on direct examination and on cross examination testified that at the instigation of the defendant, he "sucked it a little." At Page 12 of the Transcript:

"Q. What happened after he asked you to suck his pee pee?

"A. The kids come here, and he holded the door shut so I couldn't get out, and the kids trying to push the door open. And so they opened the door. And they went in the bathroom, and he took me around the corner, and made me pee pee. He wanted me suck his pee pee a little and I sucked it a little.

"Mr. Shields: I didn't get that last statement.

"The Court: He said 'I sucked a little.'

"A. And I went back into the free show.

"Q. Vernell, what did you suck?

"A. His pee pee.

"Q. How were you—were you standing up, sitting down, or what were you doing when you were doing that?

"A. Standing up.

"Q. Did he say anything to you when you were doing that?

"A. Unh-uh.

"Q. Did you see his pee pee?

"A. (Witness nodded head in the affirmative.)

"Q. Do you have a pee pee yourself?

"A. (Witness nodded head in the affirmative.)

"Q. Where is it? Could you point to it, where it is?

"A. Right here (indicating).

"Mr. Johnson: May the record show he is pointing to his privates?

"The Court: The record may so show."

On cross examination, counsel unsuccessfully endeavored to have the witness contradict his testimony, (P. 16 & 17 of Transcript) but received again the statement of penetration (Tr. P. 20):

"Q. Then what happened, and will you tell us where?
"A. Then he wanted me suck my pee pee for a dime.

"Q. Where did he go—come over here where you were?
"A. Yes.

"Q. So he wasn't holding the door, was he?
"A. No, not then. When we got through of it, then he hold the door.

"Q. What?
"A. When I suck his pee pee, then he shut the door.

"Q. That is after you did it, then he went back and held the door; is that it?
"A. Yes.

"Q. How did he hold the door? Did he stand against it, or put his hand against it?
"A. Standed against it."

Thus we have the direct evidence of the act itself, corroborated and sustained by the testimony of the three witnesses, Webb, Smith and Harris, who though not seeing the act, placed the defendant on the scene at the time of the

offense. Further, though not alarmed, as counsel for defendant says, nevertheless, they testified to circumstances corroborating the commission of the act; to wit, the blocked door to the lavatory (Tr. P. 33, 40, 49, 54, 64, 65, 70), with the defendant and Vernell Stewart inside; the boy, Vernell, spitting and wiping his mouth (Tr. P. 35, 52, 60 & 66).

In conclusion, we quote from *State* vs. *Morasco,* supra, page 13 and 14:

> "We think the evidence amply justifies the verdict.
>
> "The contention that the discrepancy in the boy's testimony renders it unworthy of belief is untenable. The discrepancy, in so far as it relates to the facts and circumstances immediately connected with and surrounding the commission of the crime charged, is more apparent than real. The persistency with which counsel for defendant objected to practically every question asked the boy on his direct examination and the prolonged, searching, and rigorous cross-examination to which the child was subjected might well have confused and bewildered a much older and more experienced person. There is not a circumstance or incident of the trial referred to in the record that even suggests that the boy was in any sense a designing witness or that he had been coached or instructed as to what his testimony should be. His answers were frank and artless, and showed entire candor on his part. His testimony showed that he did not have the slightest conception of the revolting character of the assault. In fact, his tender age precludes any inference that he knew or should have known that the defendant's conduct, as he related it, was anything more than a mere impropriety. Therefore his testimony that he entertained no ill feelings toward the defendant, but that he "liked"

him, does not necessarily weaken or neutralize the effect of his evidence wherein he describes the defendant's conduct—what he did in making the alleged assault.

"The court, as we have pointed out, instructed the jury that they should, because of the boy's tender years, examine his testimony with care and caution. Thus the defendant's rights in this regard were fully protected."

We submit the verdict should be affirmed.

Respectfully submitted,

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