1978

State of Utah v. George David Mellen : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GEORGE DAVID MELLEN,

Defendant-Appellant.

Case No. 15528

BRIEF OF RESPONDENT

APPEAL FROM A VERDICT OF GUILTY AND THE JUDGMENT BASED THEREON BY THE HONORABLE JAY E. BANKS, JUDGE OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent

BRUCE C. LUBECK

Salt Lake Legal
Defender Association
343 South Sixth East
Salt Lake City, Utah 84102

Attorney for Appellant

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GEORGE DAVID MELLEN,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with two first degree felonies, Aggravated Kidnapping and Aggravated Sexual Assault. The appellant pled not guilty, and relied on the defense of insanity at the time the crime was committed.

DISPOSITION IN LOWER COURT

The appellant was found guilty on both charges by a jury at a trial held on October 11 and 12, 1977, in the Third District Court, before the Honorable Jay E. Banks. The appellant was sentenced on each count to an indeterminate term in the Utah State Prison of not less than five years nor more than life, the sentences to run concurrently.

RELIEF SOUGHT ON APPEAL

The respondent seeks an affirmance of the conviction.

STATEMENT OF FACTS

The facts in this case are not contested. The victim testified that while she was walking in the downtown area of Salt Lake City on Sunday, March 13, 1977, the appellant approached her in his car and asked if she needed a ride home (R.89,93,112). She refused the ride, but in the course of the conversation, the appellant took her by the hand and pulled her into his car and proceeded out into the traffic (R.93). After a misunderstanding as to the victim's address, the appellant located the victim's apartment, but instead of letting her disembark, made a U-turn and at about the same time grabbed the victim by the throat and pushed her head down into his lap (R.97,98,113). After threatening her life if she caused trouble, he commanded her to perform sodomy on him while he drove (R.99,113). At one point the victim tried to force the car out of control and make an escape, but was subdued by the appellant (R.100). During the course of the act, the appellant partially undressed the victim and fondled her breasts and vagina

(R.101,113). The appellant released the victim near her home and warned her not to report the occurence to the police (R.103).

The appellant was arrested on May 4, 1977 (R. 114). On July 18, 1977, the appellant made a confession to the Salt Lake City Police Department (R.109-113).

The defense at trial was insanity at the time he committed the act. Both the appellant and the State presented expert testimony as to the appellant's sanity. Dr. James Whitten testified for the appellant and offered his opinion, based on his court-ordered examination of the appellant in August, 1977, that the appellant was a chronic paranoid schizophrenic (R.125,126), and that he lacked capacity at the time the crime was committed (R.130). The State presented Dr. Van Austin, who testified that based on numerous tests and examinations made while the appellant was at the Utah State Hospital during June, 1977, the appellant was not mentally ill at that time or in March, 1977 (R.201,202).

The appellant's proffers of lay testimony as to the appellant's sanity several months after the trial were excluded by the court as being too remote, and therefore not probative or material (R.174). The court acknowledged that a lay person can give an opinion as

to the mental state of an individual, if the testimony would be material to the issues (R.167).

ARGUMENT

POINT I

A TRIAL JUDGE MAY EXAMINE A WITNESS FOR THE PURPOSE OF ELICITING FACTS MATERIAL TO THE CASE AT BAR.

The appellant's sole defense in the case at bar was that he was insane at the time he committed the acts for which he has been convicted. During the course of the appellant's case in chief, he presented as a witness Dr. James Whitten, a psychiatrist appointed by the court (R.131-147). Based upon his examination of the appellant conducted five months after the crime had been committed, Dr. Whitten concluded that the appellant was a paranoid schizophrenic (R.126). The witness was examined at some length by both attorneys, and at the conclusion of the appellant's redirect, the trial judge asked the witness the following six questions:

> "THE COURT: I take it, Doctor, that you make your diagnosis of the mental state of an individual based on his behavior pattern at a certain time as to what he says and what he does and your experience, is that correct?

A. That's correct, mostly his thinking at that time.

THE COURT: So, if we were to look back to March the 13th, what he says and does at that time would be his behaviorial pattern, and that's what you'd have to base your opinion on?

A. I would--that's true.

THE COURT: And schizophrenic goes in cycles, does it not?

A. Characteristically.

THE COURT: Characteristically and they are responsible at times, is that correct?

A. Quite.

THE COURT: And at times they do know the difference between right and wrong and can choose the right from the wrong?

A. Absolutely so.

THE COURT: So, it depends upon the behavior pattern at a particular time that you're trying to examine as to whether or nor he would be responsible?

A. That's correct." (R.150, lines 2-27.)

The Utah Supreme Court, in an often cited case, recognized that "a trial judge is within his rights in asking questions for the purpose of eliciting the truth or to clear up an obscurity," and that the trial judge "is more than a mere moderator or referee." State v. Gleason, 40 P.2d 222 at 227, 86 Utah 2d 26 at 37 (1935). In State v. Tuggle, 501 P.2d 636 at 637 (Utah 1972), the Court referred to People v. Harris, 198 P.2d 60 at 65, 87 Cal.App.2d 818 (1948), and quoted as follows:

> "[T]he law does not require the judge to maintain a sphinx-like attitude and merely to announce his decision upon mooted points. On the contrary, he must see to it that no factual issue is left in a fog when by proper statement or inquiry the testimony might be made clear. His primary duty is to see that justice is administered, and this cannot under all circumstances be done by silence and inaction in the presence of a controversy. . . ."

Dr. Whitten had testified for quite some time, and as the judge indicated (R.178), he intended his questions to serve as a means to summarize the Doctor's testimony by directing it to the issue at trial. Although the effect of the judge's questions cannot be controlled by his intentions, his questions were material to the single issue at trial. It is important to note that the judge did not indicate his opinion as to the guilt or innocence of the accused by the manner in which he phrased the questions. State v. Green, 57 P.2d 750, 89 Utah 437 (1936). He did not address himself in a manner designed to make the witness change his testimony, or to attack his credibility. Nor was his questioning so extensive as to convey any impression of his opinion to the jury.

The Alaska Supreme Court, citing State v. Gleason, supra, with approval in Marrone v. State, 359 P.2d 969

(Alaska 1961), stated at 986 that since "[A]ppellant does not claim that the trial judge indicated by his physical demeanor any bias, prejudice or opinion, and we assume, therefore, that there was nothing objectionable in his expression, inflection of voice, or manner of propounding the questions."

At the conclusion of the trial, the judge instructed the jury that they should not be influenced by any statement made or act done by the court; and furthermore, that it is immaterial to their decision what the court thinks (R.30). The trial judge acted within reasonable bounds in asking the questions, and was acting within the scope of the rule laid down in Gleason, supra.

POINT II

THE TRIAL JUDGE ACTED PROPERLY IN EXCLUDING THE PROFFERED TESTIMONY AS BEING TOO REMOTE IN TIME TO THE ACT CHARGED, AND BEING IMMATERIAL AS TO THE APPELLANT'S SANITY ON MARCH 13, 1977.

It is commonly recognized that a lay witness can, under proper circumstances, give his opinion as to the sanity of a person at a particular point in time. State v. Robinson, 408 P.2d 29, 99 Ariz. 241 (1965); State v. Odell, 227 P.2d 710, 38 Wash.2d 4 (1951). However, in cases where non-expert witnesses have been allowed to offer their opinion as to the sanity of a party, their observations

of the party have been made either shortly before, during or after the act, or based on a long and continued acquaintance with the party. The witness' opinion must be based on his personal observation of the person, and the observation must have the requisite proximity in time to the act to move the court to receive it. People v. Medina, 521 P.2d 1257 (Colo. 1974); State v. Overton, 562 P.2d 726, 114 Ariz. 553 (1977).

In the case at bar, Mr. Oster and Mr. Yengich, lay witnesses whose testimonies were refused, were both basing their opinions on observations made sometime after the crime. Mr. Oster visited with the appellant on only two occasions, the first such occasion being over four months after the crime (R.152). The total time he spent with the appellant was only two and one quarter hours. Mr. Yengich had periodic visits with the appellant over a two and one half month period. However, his first visit with the appellant was not until nearly seven weeks after the crime had been committed. Neither witness was qualified to offer an opinion as to the appellant's sanity at the time of the crime, which was the only issue in the trial.

In Medina, supra, the Colorado court found that where an investigator had visited with the defendant some two months after the crime and for thirty to forty-five minutes on one occasion, and forty-five to fifty minutes on five or six other occasions, the trial court had abused its discretion in permitting the non-expert investigator's opinion as to sanity. The arresting officer in Robinson, supra, apprehended the defendant within one hour after the crime was committed, and was allowed to offer his opinion as to the defendant's sanity. State v. Prewitt, 452 P.2d 500, 104 Ariz. 326 (1969), is based on virtually identical facts, and again the lay testimony was admitted. The lay witnesses in State v. Randol, 513 P.2d 248, 212 Kan. 461 (1973), were permitted to offer their opinions as to defendant's sanity where their observations were made soon after the offense.

In the Utah case of State v. Robert Wayne Gleason, 405 P.2d 793, 17 U.2d 150 (1965), the court stated that where two psychiatrists examined the defendant two months after the crime, and diagnosed him as being schizophrenic-paranoic at that time, that such a diagnosis "does not prove anything as to his mentality two months before," at 794. In a non-criminal case, the Utah court in In Re Hansen's Will, 167 Pac. 256, 50 Utah 207 (1917), had

another chance to examine lay testimony as to sanity, and stated at 261 that ". . . the facts upon which the opinion is based should not be too remote in point of time."

Wigmore on Evidence, § 233, addresses the problem in this manner:

> "There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible. The circumstances of each case must furnish the varying criterion, and the determination of the trial judge ought to be allowed to control."

The appellant does not contend that the lay witnesses can offer their opinion as to his sanity at the time of the crime. Any evidence or opinions that they might render would only reflect on the appellant's condition at the time he was observed, and would be offered only for the jury to weigh on that point. Under the Utah Rules of Evidence, Rule 45, the trial judge has discretion in admitting evidence to trial. The Utah court in In Re Hansen, supra, noted that in this area "that no hard and fast rule can be laid down governing all cases." Id. at 262. In Medina, supra, the Colorado Court recognized the judge's discretion in receiving non-expert opinion testimony. The trial judge has a duty to make adequate inquiry as to the opportunity and knowledge

of the witness to form the opinion, and use his discretion in permitting the witness to testify. State v. Lujan, 534 P.2d 1112, 87 N.M. 400 (1975).

In the case at bar, the witnesses whose testimony was refused were both basing their opinions on observations made some time after the crime. Mr. Oster visited with the appellant on only two occasions, the first such occasion being over four months after the crime (R.152). The total time he spent with the appellant was only two and one quarter hours. Mr. Yengich had periodic visits with the appellant over a two and one half month period. However, his first visit with the appellant was not until nearly seven weeks after the crime had been committed. Neither witness was qualified to offer an opinion.

The trial judge acted properly in view of the existing case law, and within the limits of his discretion in disallowing the proffered evidence as being too remote and immaterial.

POINT III

THE EXCLUSION OF THE PROFFERED LAY WITNESS TESTIMONY AS TO APPELLANT'S SANITY WAS NOT ERRONEOUS, AND EVEN IF THE EVIDENCE WAS ADMISSIBLE, THE JUDGE'S REFUSAL DID NOT CONSTITUTE REVERSIBLE ERROR.

Rule 45 of the Utah Rules of Evidence discusses the discretion of the judge in excluding evidence if he finds its "probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury. . . ."

As was discussed in Point II of Respondent's Brief, the issue at trial was the appellant's sanity at the time the crime was committed. The proffered testimony dealt only with the appellant's sanity at a later time, and was not material.

During the course of the trial, two expert witnesses were called to testify as to their opinion of the appellant's sanity at the time they examined him (R.125,201), and at the time of the crime (R.130,202). The evidence that appellant sought to introduce through his proffer was merely cumulative of other evidence that had been or was presented. In State v. Zumalt, 451 P.2d 253 at 256, 202 Kan. 595 (1969), the court stated:

> ". . . the rule is that, generally, any error in the exclusion of evidence is cured when the same, or substantially the same, evidence is, through the same or other witnesses, subsequently admitted."

Where the excluded evidence, viewed in light of all the testimony presented, is merely cumulative, there is no reversible error. Fry v. State, 529 P.2d 521 (Okla. Crim. App. 1974); People v. Thompson, 285 P.2d 958 (Cal. 1955).

The appellant claims that the proffered evidence should have been admitted under Rule 63(1)(c), Utah Rules of Evidence, as being supportive of Dr. Whitten's reference to the appellant's delusional system. However, the system was referred to by three witnesses other than Dr. Whitten during the trial. Pat Smith, a detective for the Salt Lake City Police Department read from the appellant's July 18 confession in which he referred to the system (R.116,117). Dr. Van Austin, the State's expert, made note of the fact that the appellant had referred to the system in interviews he conducted (R.201). The appellant himself referred to the system (R.187). In short, there was more than enough evidence to allow the jury to make an informed decision on the appellant's sanity.

Rule 5, Utah Rules of Evidence, states:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision thereon be reversed, by reason of the erroneous exclusion of evidence unless. . . (b) the court which passes upon the effect of the

> error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding." (Emphasis added.)

The excluded evidence was not material to the issue at trial. There was evidence from four witnesses on the appellant's sanity at a later date. The exclusion of the evidence in this case did not constitute reversible error. "It is only where there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted." State v. Neal, 262 P.2d 756, at 759, 1 Utah 2d 122 (1953).

CONCLUSION

The trial judge acted properly in asking questions of the appellant's expert witness and in excluding the proffered testimony as being immaterial and remote in time. The appellant's rights have not been substantially prejudiced.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

CRAIG L. BARLOW
Assistant Attorney General

Attorney for Respondent