2001

State of Utah v. James E. Travis : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

vs.

JAMES E. TRAVIS,
Defendant-Appellant.

Case No. 13834

BRIEF OF APPELLANT

Appeal from a judgment of the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

LARRY R. KELLER
Salt Lake Legal Defender Association
343 South Sixth East
Salt Lake City, Utah
Attorney for Appellant

VERNON B. ROMNEY
Attorney General, State of Utah
236 State Capitol
Salt Lake City, Utah
Attorney for Respondent.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of robbery in the Third District Court for the State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, James E. Travis, was convicted by a jury of the crime of robbery on August 29, 1974, in the Court of the Honorable Jay E. Banks, and was

sentenced to serve the indeterminate term provided by law in the Utah State Prison, namely one to fifteen years.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him and a new trial in this matter.

STATEMENT OF FACTS

The facts presented at trial were as follows:

Robert Charles Zancanella testified that at approximately 2:30 a.m. on June 26, 1974, he was in Radio City Lounge with Blair E. Roberts, the night bartender, who was cleaning up after closing the bar. Zancanella, who was waiting for a cab, heard a knock at the door, and upon opening the door he saw the appellant and William Kendrick. He further testified that the appellant asked if he could come in and use the phone to call the hospital because Mr. Robert's roommate, Duane Daniels, had become ill. The two men pushed open the door and entered the bar at the moment Mr. Roberts reached the door from the inside. Zancanella testified that appellant said, "Don't make a move," and pushed Roberts to the floor. The witness then testified that Kendrick struck him in the left side with something wooden such as a club, the same shape as State's exhibit No. 7.

Zancanella testified on direct examination that ap-

pellant then took his wallet. (R. 119 1st day) On cross examination, however, he testified that Kendrick had taken it. (R. 138 1st day) Although previously unable to make a positive identification, the witness testified that it was appellant who went behind the bar and found the money. Shortly thereafter, the two men left.

On cross examination, the witness testified that he heard one of the men say something to the effect of "What are you doing? Let's get out of here." (R. 140 1st day)

The police immediately arrived at the scene of the robbery and took the witness to the I-80 overpass on 20th East where he identified the appellant and Kendrick as the perpetrators of the crime.

Helen Burns later testified that Zancanella had testified at preliminary hearing that it was Kendrick, and not the appellant, who first asked to use the phone and that the appellant didn't enter the bar until shortly thereafter. (R. 197-198 2nd day) She further testified that at preliminary hearing, Zancanella testified that he could give positive identification of Kendrick but only tentative identification of appellant, while on the I-80 overpass and at trial he testified that he positively identified both of them at that time.

Blair Eldon Roberts, the bartender on duty on the night of June 25 and morning of June 26, 1974, testified that he was cleaing up the bar at approximately

2:30 a.m. when he was summoned to the front door by Mr. Zancanella who was waiting for a cab. He testified that it was the appellant who told him that Duane was sick, but at preliminary hearing he had been unable to ascertain which of the two had told him that. It was at that point, he testified, that he got hit and fell to the floor. When he came to, Kendrick asked him for his money and he complied. On cross examination he testified that he heard one of the men say to the other "What are you doing? Stop that. Let's get out of here. Let's go Jack, we've done enough . . . damage in here." He testified that he never saw the appellant go behind the bar, and the only object he saw was a round wooden or metal container which stuck approximately 10 inches out of Kendrick's pocket. (R. 128-129, 2nd day)

Officer W. G. Hatch testified that in response to a dispatch at approximately 3:20 a.m. on June 26, 1974, he stopped the car in which appellant was riding. He further testified that co-defendant Kendrick was seated in the right rear seat, appellant was in the front passenger side and Lynn Rewe was driving. (R. 155-157, 2nd day)

Sargent Clayton E. Conger testified that on June 26, 1974 in the early morning hours, he went to I-80 at approximately 20th East where he searched the above mentioned car. He found a money bag under the right front seat containing $79.17 in coins. (R. 191-194, 2nd day)

Officer Stephen Diamond testified that approximately 10:00 or 11:00 a.m. on June 26, 1974, he searched the trailer and car in which appellant and Kendrick were riding when they were arrested. He found a roll of currency under the back seat and loose change on the front seat totaling $193.93. He also found a wrecking bar with an extension cord wrapped around it under the rubber floor mat of the driver's seat. (R. 174-183, 2nd day)

James E. Travis testified that on June 25, 1974, he, Lynn Rewe and William Kendrick stopped to rest for the day in Salt Lake City enroute from Los Angeles to New Jersey where employment awaited. The three had left Los Angeles in two cars, but shortly after their departure, the appellant's car had broken down. He sold the car, rented a U-Haul trailer which Rewe and Kendrick agreed to pull with Rewe's car. Due to problems with the car overheating, they planned to travel at night. (R. 212-216, 2nd day)

The appellant testified that they spent the day doing errands in Salt Lake City and at approximately 1:00 a.m. on June 26, he, Kendrick and Rewe went into Radio City Lounge for a beer. There they met Duane Daniels who invited them to a party at his home. Travis testified that the three of them left the bar with Daniels at approximately 2:00 a.m. At Daniels' house, Kendrick was upset by homosexual advances made by Daniels. Consequently, the appellant, Ken-

drick and Rewe immediately left the house to return to their motel. (R. 217-218)

The appellant further testified that en route to the motel, while passing Radio City Lounge, Kendrick told Rewe to stop the car so he could "get even with those faggots." (R. 220-222). He testified that when Kendrick got out of the car, he followed him, grabbed him by the arm and unsuccessfully tried to dissuade him from going back into the bar. (R. 223) Kendrick proceeded toward the bar and the appellant went back to the car. (R. 223) The appellant testified he then went to the Lounge to retrieve Kendrick and through a window in the door saw Kendrick hit the bartender, Mr. Roberts, in the head with something. (R. 223-224) The appellant testified he immediately entered the bar and stepped in between Kendrick and Mr. Zancanella, preventing Kendrick from striking the latter. Kendrick instead hit the appellant once in the leg and once in the shoulder, causing it to bleed. He testified that he did not know what Kendrick hit him with, but it was something other than a fist. (R. 224) The appellant testified Kendrick temporarily disappeared from sight and he then told Mr. Roberts and Mr. Zancanella to lay on the floor and he would not let Kendrick hurt them. (R. 225) He testified that when Kendrick reappeared, he grabbed him by the arm and said "Let's get the hell out of here," and went out the door of the lounge. The appellant testified he waited a few seconds and when Kendrick didn't appear, he went back inside, retrieved Kendrick, and the two men left together. (R. 225)

The appellant testified the three then drove back to their motel and he suggested they pack their things to leave Salt Lake City. He testified Kendrick then produced some money and told the appellant it belonged partly to him. The appellant asked him where the money came from, and when Kendrick said he took it from the bar, the appellant refused to take any of it. (R. 226) Since they had intended to leave that night anyway, and because of their trouble at the bar, they prepared to depart; Kendrick packed things in the car, and the appellant packed the U-Haul trailer, and hooked it to the car. (R. 227)

The appellant further testified that as they left the motel for the freeway to leave the city, Mrs. Rewe was driving, he was riding in the front seat and Mr. Kendrick was riding in the back seat. (R. 228) The car was stopped by police officers on the freeway ramp to I-80 at 20th East. The appellant denied having seen the money bag or the pawn ticket prior to the trial. (R. 228) The appellant also testified that the charges against Ms. Rewe had been dismissed and he had been unable to locate her to aid in his defense.

Counsel for the appellant and the prosecutor agreed that if he had been available to testify, Officer Vaughn would have testified that shortly after the arrest, the officers questioning the appellant noticed a fresh cut on appellant's shoulder and blood stains on the inside right shoulder of his shirt. (R. 284, 2nd day).

In addition to testimony presented at trial, the attorney for appellant attempted to introduce into evidence a prior statement made under oath in open court by the co-defendant, William Kendrick. (R. 278-279, 3rd day) The statement corroborated appellant's testimony and exonerated appellant from any criminal activity. This had been preceded by appellant's attorney's effort to call the co-defendant Kendrick as a witness in the case. Upon hearing that co-defendant Kendrick intended to refuse to testify on the grounds that his testimony might tend to incriminate him, Judge Banks refused to allow him to take the stand. (R. 208-209, 2nd day)

ARGUMENT

POINT I

THE TRIAL JUDGE COMMITTED PREJUDICIAL ERROR BY REFUSING TO ALLOW APPELLANT TO CALL AS A WITNESS A CO-DEFENDANT FACING A SEPARATE TRIAL ON THE CHARGE MERELY BECAUSE THE CO-DEFENDANT INTENDED TO INVOKE HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

Although appellant and one William Kendrick were charged as co-defendants in the above-entitled matter, the Honorable Jay E. Banks, after an evidentiary hearing and motion by attorneys for both defend-

ants, severed the charges and ruled that appellant was to be tried first. At appellant's trial, appellant's attorney called to the stand the former co-defendant Kendrick, not on trial at that time. After dismissing the jury, and before witness Kendrick took the stand, the Judge asked Kendrick and his attorney if Kendrick intended to testify. Kendrick stated he intended to exercise his privilege against self-incrimination. Upon learning this, the Judge dismissed Kendrick, and over the objection of appellant, refused to allow him to be called as a witness. (R. 208-210, 2nd day)

The Fifth Amendment privilege against self-incrimination is available to any witness or accused in a criminal prosecution, however, it is a privilege which is not absolute. A common limitation which has been expressed by many courts is that the Fifth Amendment privilege is by nature a personal privilege and therefore must be claimed by the individual involved. In addition, many courts, when faced with the question, have held the privilege must be raised with respect to specific questions and cannot be asserted as a blanket prohibition against inquiry.

This position was explicitly stated by the Court in *Gowen v. Wilkerson*, 364 Fed. Supp. 1043, (U.S. Dist. Ct., W.D. Va. 1973), a habeas corpus probeeding contesting a contempt conviction and sentence. The defendant was called as an adverse witness to explain why he failed to make support payments to his wife. Since his testimony could also be used against him in a

criminal prosecution, the defendant refused to answer any questions. The court refused to review the sentence since it was within the limits of the state statute; however the court stated the situation was such that although the defendant was entitled to assert his Fifth Amendment privilege, he had raised the privilege improperly in this instance.

> But even if the danger of self-incrimination was great, petitioner's remedy was not to voice a blanket refused to testify, as his counsel intimates was done, but rather to take the stand and as to each question elect to raise or not to raise the Fifth Amendment privilege. 364 F. Supp. at 1045.

A similar position was enunciated by the Sixth Circuit in *U.S. v. Harmon,* 339 F.2d 354 (U.S. Ct. of Appeals ,6th Cir. 1964) where the defendant was convicted of embezzlement and conversion of union funds. In his appeal, the defendant claimed prejudicial error in the trial judge's ruling allowing counsel for the Government to call three witnesses who had stated, prior to being called, that they would refuse to testify on the grounds that it may incriminate them. The Appellate Court found no prejudicial error and upheld the conviction. In its decision, the court stated:

> The privilege against self-incrimination may not be asserted in advance of questions actually propounded In no event may the witness refuse to be sworn. . . . We do not believe that the trial judge had the right to preclude either party

from calling witnesses. The District Judge had the opportunity to pass upon the issue only when the witnesses were sworn and invoked their privilege. 339 F.2d at 359.

The facts of the matter currently before the Court present a more blatant example of error by the Trial Judge than existed in the previously cited cases. In a voir dire examination of the co-defendant, out of the presence of the jury, the judge refused to allow appellant's attorney to call the co-defendant as a witness:

(Jurors leave the room.)

COURT: The record may show that Mr. Kendrick is in the room and he is represented by Mr. Housley. Have you had a chance to talk with him about claiming the Fifth Amendment?

MR. HOUSLEY: I have your Honor.

COURT: And have you advised him to claim the Fifth Amendment?

A. Yes sir, I have advised him and also to claim his rights under Rule 23, under the Utah Rules of Evidence.

COURT: Mr. Kendrick, if you were called to the stand and questioned about this incident, would you claim the Fifth Amendment?

MR. KENDRICK: Yes sir, I would.

COURT: All right, you may remove him from the court room.

MR. KELLER: Your Honor, if it please the Court, whether or not—if he claims the Fifth Amendment I believe I have a right to call him as a witness. He is not the accused in this trial.

> The accused is Mr. Travis. Now if he desires to take the Fifth Amendment there is nothing you can do about that, but certainly I have the right to call him and nothing that I know of says that I can't call him as a witness.
>
> COURT: That's right, but he indicated he will claim the Fifth Amendment. (R. 208-209)

This blanket refusal by the trial judge to even allow co-defendant Kendrick to be sworn, constitutes a violation of the law established by the U.S. Court of Appeals for the Sixth Circuit in *Harmon, supra,* and the U.S. District Court for W.D. Va. in *Gowen, supra.* The prejudice of such error by a trial judge was dramatically illustrated by the United States Supreme Court in the landmark decision of *Hoffman v. U.S.*, 341 U.S. 479, 71 S.C. 814, 95 L.Ed. 1118 (1950). In that decision the Court said:

> But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justfied . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge, in apprais-

> ing the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence. . .' 341 U.S. at 486-487.

In the matter before the Court, co-defendant Kendrick had given a prior statement under oath in support of his motion for a separate trial, as did defendant Travis. (See R. 336-340) In this statement, made to help the court determine whether or not a conflict between the defenses of the two defendants existed and therefore grounds for separate trials, Kendrick denied any criminal involvement on his part as to a robbery, and specifically exculpated Travis from any participation in or knowledge of a robbery. (R. 339)

Prior to the time Kendrick made this statement, his counsel had admonished him that he was under oath and subject to penalty for perjury if he testified falsely. (R. 336)

Appellant maintains that at the very least, the trial judge should have allowed Kendrick to be called as a witness by appellant, and then the Judge should have made a determination with each individual question as to whther or not Kendrick could assert his privilege against self-incrimination. This becomes remarkably clear in light of Kendrick's prior statement which the Judge could easily have concluded did not incriminate him. The mandate of the U.S. Supreme Court is clear. It is the trial judge's duty to determine whether or not a witness has "reasonable cause to ap-

prehend danger from a direct answer." *Hoffman, supra.* The substance of Kendrick's statement relating to appellant corroborates appellant's testimony at his own trial concerning his involvement in the incident; that appellant's participation consisted solely of attempting to prevent Kendrick from beating up the homosexuals in Radio City Lounge. Therefore, Kendrick's testimony was not incriminating and he was improperly excluded as a witness in appellant's trial.

In the present case, co-defendant Kendrick's previous testimony tended to exonerate appellant from any participation in the robbery. Consequently, the trial judge's failure to inquire as to the substance of Mr. Kendrick's potential testimony and his refusal to allow Mr. Kendrick to take the stand constituted such prejudicial error that a new trial is mandated.

Such a result was reached in *N.J. v. Jennings*, 312 A.2d 864 (Sup. Ct. N.J., Appellate Div. 3-30-72), where the defendant had been convicted of manslaughter by a jury . At a voir dire examination, (with the jury excused) of a key defense witness, the witness testified he had been with the defendant at the time of the killing and that the defendant had acted in self-defense. The trial judge ruled the witness did not have to testify because it would tend to incriminate him. The Court held that permitting a witness' counsel to invoke the privilege for his client is reversible error. In ordering a new trial, the Court stated that if the witness were called at the new trial

> . . . the latter shall be required to take the stand before the jury, under oath (or affirmation), await specific questions, and either answer them or personally assert and demonstrate a basis for not doing so grounded in a claim of self-incrimination. 312 A.2d at 868-869.

In the present case, co-defendant Kendrick's Fifth Amendment privilege in no way would have been jeopardized by his relating to the jury testimony he had previously given in open court. The excluded testimony was exculpatory for the appellant and Mr. Kendrick was the only person with the knowledge of the situation to be able to support appellant's own testimony. As a result, the erroneous exclusion withheld vital information from the jury and was highly prejudicial to the appellant.

POINT II

THE TRIAL COURT ERRED BY REFUSING TO ADMIT INTO EVIDENCE THE AFFIDAVIT MADE PREVIOUSLY BY CO-DEFENDANT KENDRICK.

At the hearing on the motion to sever the trials of co-defendants Kendrick and appellant, Mr. Kendrick, who was represented by counsel, made a statement while under oath which tended to exculpate appellant. At appellant's trial Mr. Kendrick asserted his privilege against self-incrimination and on that basis

the trial judge refused to allow him to be called as a defense witness. The U. S. Ct. of Appeals for the 10th Circuit has consistently held that when a witness invokes his Fifth Amendment privilege he is considered "unavailable" and transcripts of his prior testimony will be admitted in corollary proceedings. Such was the result in *U.S. v. Allen*, 409 F.2d 611 (U. S. Ct. of Appeals, 10th Cir. 1969.) In that case witnesses had invoked their Fifth Amendment privilege against self-incrimination and the Trial Court held that they were "unavailable" and admitted transcripts of their testimony made at preliminary hearing. Affirming the Trial Court's decision, the Appellate Court said that: "the requirement of unavailability is satisfied when the witness is physically present but the testimony is unavailable because of the invocation of the Fifth Amendment privilege." 409 F.2d at 613. The Court went on to say that transcripts of the witnesses' testimony at preliminary hearing could be used at the trial of the defendant and stated "that the test is the opportunity for full and complete cross examination rather than the use which is made of that opportunity." 409 F.2d at 613.

A more persuasive pronouncement, made by the same court, is found in *Mason v. U.S. and Gladney v.* U.S., 408 F.2d 903 (U.S. Ct. of Appeals, 10th Cir. 1969.) In *Mason* the Trial Court permitted the use of witnesses' testimony in a prior trial to be admitted in a subsequent trial, after reversal and remand from the Circuit Court, where the witnesses invoked their

privilege against self-incrimination at the subsequent trial. The court stated that the controlling element under the rule which permits such testimony is "whether the *testimony* of the witness is sought and is available and not whether the witness' body is available." 408 F.2d at 906.

Further, in *U.S. v. Mobley*, 421 F.2d 345 (U.S. Ct. of Appeals, 5th Cir. 1971) the court allowed the introduction of testimony from a previous trial where the witness asserted his Fifth Amendment privilege at a subsequent trial stating that the witness "was no less available than he would have been at instances of death or absence of country or physical inability to speak." 421 F.2d at 351.

The Utah Rules of Evidence as adopted by the Utah Supreme Court, effective July 1, 1971, also recognizes this interpretation of "unavailable" in Rule 62 (7).

> "'Unavailable as a witness' includes situations where the witness is (a) exempted on the ground of privilege from testifying concerning the matter to which his statement is relevant . . ."

Since co-defendant Kendrick, through his counsel, told the trial judge that he intended to exercise his privilege against self-incrimination were he to be called as a witness, he should have been deemed "unavailable" for the purposes of that trial pursuant to Rule 62 (7).

Having concluded that Kendrick's insistence on his privilege against self-incrimination at appellant's trial makes him unavailable as a witness pursuant to the case law and the Utah Rules of Evidence, we turn to the issue of whether or not Kendrick's prior sworn statement in open court (R. 336-340) should have been admissable in appellant's trial.

At trial, appellant's attorney moved to introduce Kendrick's prior affidavit or sworn statement in open court. (R. 278 3rd day.) The trial judge denied the motion and appellant properly objected and took exception to the court's ruling. (R. 279 3rd day.) Appellant contends that this affidavit was proper evidence under Rule 63 (2) which is the affidavit exception to the hearsay rule. It states: "Affidavits to the extent admissible by the statutes and rules of this state" (as in Rule 43 (e) of the Utah Rules of Civil Procedure) are admissable as exceptions to the hearsay rule.

It was highly prjudicial not to allow into evidence the sworn statement made by co-defendant Kendrick because that statement was highly probative and essential to the defense of appellant. Without any corroboration of appellant's defense, his testimony lacked the credibility Mr. Kendrick's statement would have afforded it. The statement, had it been admitted, would have had the additional value of having been a declaration against interest and therefore admissable under another exception to the hearsay rule, Rule 63 (10), since Mr. Kendrick admitted going into the bar for

the purpose of assaulting the occupants. He explained that appellant only then entered the bar in an effort to stop him. The jury could have more easily accepted appellant's testimony had Mr. Kendrick's statement been admitted as support for that testimony. The statement made by Mr. Kendrick should have been introduced to the jury for their evaluation of appellant's defense. It was prejudicial not to allow the statement into evidence since it was the only evidence which could have supported appellant's contention. Without it, the jury had to rely on appellant's word alone without any corroboration.

CONCLUSION

For the reasons stated, it is requested that the judgment of the trial court be reversed and the defendant granted a new trial.

Respectfully submitted,

LARRY R. KELLER,
Attorney for Appellant