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State of Utah v. James M. Gray : Brief of Appellant (Amended)

Utah Supreme Court

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IN THE
SUPREME COURT OF UTAH

STATE OF UTAH,

Plaintiff-
Respondent,

-vs-

JAMES M. GRAY,

Defendant-
Appellant,

Case No. 15550

BRIEF OF APPELLANT (AMENDED)

Appeal from the judgment of the Fourth Judicial
District Court, State of Utah, the Honorable
Allan B. Sorensen, Judge.

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IN THE
SUPREME COURT OF UTAH

STATE OF UTAH,

Plaintiff-
Respondent,

-vs-

JAMES M. GRAY,

Defendant-
Appellant

Case No. 15550

BRIEF OF APPELLANT (AMENDED)

NATURE OF THE CASE

This is a criminal action brought by the State of Utah against defendant-appellant James M. Gray charging him with burglary, a felony in the second degree, in violation of 76-6-202 Utah Code Annot. (1953), as amended.

DISPOSITION IN LOWER COURT

Upon trial by jury in the Fourth Judicial District Court, Uintah County, State of Utah, appellant was found guilty of burglary, as charged, on November 1, 1977, and was subsequently sentenced to the Utah State Prison for a term of one to fifteen years.

RELIEF SOUGHT ON APPEAL

Appellant seeks an Order of this Court reversing his conviction and quashing the information herein, or, in the alternative, remanding the case to the district court for a new trial consistent with the rulings of this Court.

STATEMENT OF THE FACTS

The evidence discloses that a burglary occurred on the 18th day of September, 1977 in Uintah County, State of Utah, that appellant was periodically in the company of a confessed perpetrator of the crime and that appellant may have aided that person by selling items obtained in the burglary. Further, the evidence is that appellant was intoxicated during the day and evening in question.

ARGUMENT

POINT 1. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening statement defense counsel stated to the jury that he was "appointed" counsel for the defendant and that he expected the evidence to show "That there will be no evidence that the defendant here, Mr. Gray, ever entered the premises that was supposed to have alleged to be burglarized." (T.5). Counsel also stated that "...we will introduce testimony from one of the parties that was supposed to have been charged in this same action that he didn't in fact---didn't commit the burglary." (T.6). Apparently

defense counsel was totally ignorant of the aiding and abetting statute (76-2-202 U.C.A. 1953 as amended) since he stated in his opening argument that "...he might have dealt in some of the or handled some of the items as to the burglary..." (T.5), and based a motion at the close of the State's evidence to dismiss on the grounds that the defendant was not charged with having possession of property that was recently stolen and that the evidence failed to disclose any breaking and entering. As defense counsel stated in his motion "There might have been other crimes, but he is not charged with having possession of property that is recently stolen. I mean he is charged with the breaking and entering." (T.56-57).

In addition to revealing defendant's impecuniosity to the jury in his opening statement (T.5), counsel allowed witnesses to disclose to the jury that an agent from Adult Probation and Parole was involved in dealings with the defendant. See for example (T.7,8,12 and 27-28). Not only was that disclosure made but also the facts that the agent from Adult Probation and Parole had known defendant for ten years (T.28) and that defendant had been incarcerated in the Utah State Prison (t.54). All such disclosures were made without objection by counsel and without cautionary instructions to the jury.

The record further discloses that trial counsel failed to take even the rudimentary step of excluding the witnesses during the trial. See e.g. (t.22,28,40, 46,62 and 70).

Trial counsel further failed to properly investigate the case, as evidenced by the fact that he asked witness Drepler how long

he had known the defendant Gray and where he had met him, thereby eliciting otherwise inadmissible testimony most detrimental to his client. A reasonable investigation would have disclosed that defendant Gray was in prison at that time with the witness. This lack of investigation, or sheer incompetency, is further evidenced by defense counsel's failure to question witness Ziegler relative to any promises or inducements made by the State's agents or to inquire into Mr. Ziegler's record of prior felony convictions in order to impeach his testimony, this notwithstanding that Ziegler was a crucial witness for the State.

The record is replete with hearsay statements and other objectionable evidence to which defense counsel failed to make any objections or motions to strike. Defense counsel did not request cautionary instructions apparently because he did not realize the evidence was objectionable. The cumulative effect of this failure to object and/or strike testimony is further compounded by the fact that closing arguments were not recorded, resulting, at best, in pure conjecture as to the use made of objectionable evidence in closing arguments.

This Court has reviewed numerous attempts to overturn convictions on the ground that the defendant was deprived^{of}/effective assistance of counsel. For example, as recently as July 26, 1978 in State v. Pierren, consolidated cases No. 14912, 15108, 15109, and 15114, this Court reiterated the long standing rule applicable to such cases:

to show inadequate or ineffective counsel, the record must establish that counsel was ignorant of the facts or the law, resulting in withdrawal of criminal defense, reducing the trial to a "farce and a sham." Citing State v. McNichol, 554 P.2d 203 (Utah 1976).

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That standard was further explained in State v. Mc-

Nichol, supra, in which the Court stated:

he is entitled to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and presents such defenses as are available under the law and consistent with the ethics of the profession. Id., at 204.

Naturally, the defendant must be able to show that his claim of ineffective assistance of counsel was a demonstrable reality and not a speculative matter. Further, trial strategy must be differentiated from failures to investigate or effectively represent clients. As stated in People v. Martinez, 14 Cal.3d 533, 121 Cal. Rptr. 611, 535 P.2d 739 (1975):

The cases involving a failure to make factual and legal inquiries and investigations necessary to a constitutionally adequate defense are to be distinguished, of course, from cases wherein counsel, having made such inquiries and investigations makes tactical or strategic decisions... 535 P.2d at 742, emphasis added.

The record in this case clearly shows that defense counsel was ignorant of both the facts and the law. Time after time hearsay, non-responsive answers, or evidence without foundation was admitted without objection and without motions to strike. Naturally enough not all hearsay statements or non-responsive answers are claimed to be prejudicial; however, a review of the entire record compels the inescapable conclusion that due to defense counsel's inability to control the admission of hearsay and non-responsive testimony, defendant Gray was deprived of a fair trial. For example, one Officer Downer testified as to Mr. Stanley's identification of certain items of evidence (E.11, 12, 13 and 14), statements made by Mr. Butters with respect to Mr. Gray (E.14), and the hardship that the victim underwent (E.15). Defense counsel

further compounded the error with the first witness when he elicited testimony from Officer Downer that Mr. Butters stated that both Butters and Gray had been behind the wheel of the pickup truck the night in question (T.19).

Defense counsel followed the same pattern with the second witness, Officer Lance. During that testimony defense counsel elicited several damaging non-responsive answers concerning defendant's association with witness Butters without seeking the Court's assistance in having the witness respond to the question or having the answers stricken; see (T.26). Defense counsel also permitted substantial testimony concerning a search which was totally irrelevant to the case inasmuch as none of the items obtained in the search were offered as evidence; see (T.29).

The list could go on and on with respect to the subsequent witnesses and counsel's failure to object to hearsay, non-responsive answers, or lack of foundation. See for example (T.53).

Counsel's further failure to understand the law of aiding and abetting is made abundantly clear in his Motion to Dismiss (T.50-55) and in his opening statement (T.5). Although the jury was instructed on the law of aiding and abetting, counsel apparently believed that lack of entry by his client was a valid defense.

Defense counsel was further remiss by failing to exclude witnesses, a most rudimentary tactical decision, which evinces more a lack of awareness than an informed trial decision.

The record exudes defense counsel's inability to control the trial procedure or to confine it to the most rudimentary parameters of the Rules of Evidence, thereby depriving him of any opportunity to reasonably assert defendant's lack of knowledge

concerning the stolen items, his lack of intent to aid or abet, or that an alternative reasonable hypothesis existed in explanation of the defendant's actions. This trial was in fact, "a farce and a sham" and devoid of "these careful, factual and legal inquiries and investigations necessary to a constitutionally adequate defense, People v. Martinez, supra, at 742. Careful legal inquiry would have indicated to defense counsel any possible complicity as an aider and abetter as any factual inquiry would have disclosed to counsel that Ronald Ziegler had known appellant while they were in prison.

A reading of even the first few pages of the transcript demonstrates that, for whatever reason, trial counsel was unable to communicate clearly with either the judge, jury, or witnesses. That fact alone precludes the possibility of a fair trial, and combined with the legal and factual errors discussed above, reduced appellant's "trial" to a farce and sham.

POINT II. FAILURE OF THE STATE TO REPORT THE CLOSING ARGUMENTS OF COUNSEL DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO AN APPEAL.

Article I, Section 12 of the Constitution of Utah provides that "in criminal prosecutions the accused shall have.... the right to appeal in all cases".

The essence of the right to an appeal is review by an appellate court of the proceedings in a lower court; Black's Law Dictionary, Fourth Edition. And this Court has always assumed its appellate function to be one of review in search of error; State v. McLaughlin, 22 Utah 2d 321, 324, 452 P.2d 75 (1969). Appellant therefore contends that what he is entitled to is a review by the Court of the entire proceedings in the lower court and submits the

this includes a review by this Court of the closing arguments of counsel. The correctness of this contention is established by 77-42-3 Utah Code Annot. (1953) which provides that the power of this Court extends to any or all the proceedings. Since this Court can reverse because of errors committed by counsel during argument, State v. Horr, 63 Utah 22, 221 P. 867 (1923), even if unobjected to (see U.S. v. Arnold, 425 F.2d 204 (10th Cir. 1970) wherein Chief Judge Lewis at page 204 held that a Fifth Amendment violation in final argument by comment on a defendant's silence is so prejudicial that the conviction must be reversed despite failure to object), Appellant is entitled to have this Court review the closing arguments. See also, Griffin v. California, 380 U.S. 609, wherein the Court held unconstitutional California's constitutional provision allowing the prosecutor to comment upon a defendant's failure to explain any evidence.

Because his right to a full review by this Court has been precluded by the failure of agents of the state to report the closing arguments, Appellant is entitled to have his conviction reversed or, at the very least, to be granted a new trial. See, e.g., Schonover v. State, 3 CrLRptr 2186 (Tenn.Ct.Crim.App. 5/15/68) where, in granting a new trial due to the court reporter's failure to include closing arguments in the transcript, the court stated that even approval by trial counsel of an imperfect and incomplete Bill of Exceptions "could never be said to constitute a waiver of this indigent defendant's right to such appellate review on the merits of this case."

It cannot avail the State to claim that by failure to request that the closing arguments be recorded Appellant has waived this

right. Because there can be no waiver where the defendant does not know his rights, and because a waiver must be voluntary, any waiver of a constitutional right must appear affirmatively from the record. 21 AM.Jur.2d, Criminal Law, Sec.219. Courts indulge every reasonable presumption against waiver of constitutional rights, should not presume acquiescence in the loss of fundamental rights, and constitutional privileges should not be suspended by mere inferences from doubtful presumption or indifferent facts. Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct.1019 (1938). In the instant case the record is absolutely silent as to why closing arguments were not recorded, and this Court can only place responsibility for the failure with the State.

In addition, this point is inseparably involved with Point I. infra herein. Not only is this Court precluded from reviewing the prosecuting attorney's closing argument for prejudicial comment or conduct, but appellate counsel has no way of ascertaining from the record what trial counsel's theory of the defense of the case was, at least at that stage of the trial. The ability to ascertain this would aid appellate counsel in demonstrating to this Court the lack of any strategical or tactical reasons for trial counsel to fail to object to testimony which Appellant contends was inadmissible and highly prejudicial. Further, appellate counsel is precluded from reviewing trial counsel's comments to the jury during closing arguments.

Appellant submits that these preclusions are highly significant in their prejudice to him when, as here, it is contended that trial counsel was ineffective.

POINT III. PROSECUTORIAL MISCONDUCT IN ADDUCING EVIDENCE OF DEFENDANT'S PRIOR CONVICTION, INCARCERATION AND RELATIONSHIP TO ADULT PROBATION AND PAROLE CONSTITUTES PREJUDICIAL ERROR.

At the commencement of its case in chief the State established that officers Downard and Lance, and an Adult Probation and Parole agent, Kent Curtis, had picked up the Defendant for questioning in connection with this case (testimony of Officer Downard at T.7). Downard further testified that the next morning the Defendant "was advised of his rights" in agent Curtis' presence (T.8), that he investigated the crime scene with Office Lance (T.9), that he made a search of a motel room (occupied by Defendant together with a confessed perpetrator of the crime) with Officer Lance and agent Curtis (again emphasizing that Curtis was an Adult Probation and Parole Agent) (T.12-13).

The State next called Officer Lance who testified that he and agent Curtis initially went to the motel room (T.22), were joined by Officer Downard, and then searched the room.

Both of these officers testified in satisfactory detail regarding the foregoing events and recovery of items stolen in the burglary.

To add frosting to the cake, however, the State next called Kent Curtis and promptly established that he was "the Probation and Parole officer for the State of Utah" and had been acquainted with the Defendant for approximately ten years; (T.27-28). Hearing no objection from defense counsel the Court requested a bench conference and an off the record discussion was held. (T.28). Whereupon Curtis testified very

briefly to permission for search of the hotel room (already established - T.22 and 25), the results of the search (already established - T.12-14, 23-24) and that he was present during questioning of defendant by Officer Downard (again already established - T.15), although he could not testify to any damaging admissions (T.29).

It is apparent that agent Curtis' testimony was purely cumulative to the testimony of the two police officers involved and did not add anything of substance to the State's case, except to again emphasize for the jury that he was an agent for Adult Probation and Parole and had known the Defendant for ten years.

Appellant contends that even where the State elicits such information from a witness who has other relevant and necessary information, reversal is justified; however, where the only apparent reason for putting a witness on the stand is elicitation of information tending to show that the Defendant has had a relationship with an agent of Adult Probation and Parole for ten years, reversal should be compelled, especially where the State does not establish that the relationship is one other than supervision of a person convicted of another crime.

The law in Utah is clear. "[E]vidence which shows or tends to show the Defendant committed a crime other than the one for which he is being tried is, as a general rule, not admissible,"

State vs. Green No. 14435 filed April 12, 1978 in the Supreme Court of the State of Utah, emphasis added, citing Brown v. State, Okla.Cr., 506 P.2d 617 (1973); State v. Mason, Utah, 530 P.2d 795; State v. Henrique, Or., 531 P.2d 239 (1975). See also Rule

The touchstone Utah case is State v. Dickson, 12 Utah 8, 361 P.2d 412 (1961), wherein the Court stated, at 12 Utah 12:

It's [the evidence in question i.e. that the Defendant had been charged with unrelated subsequent crimes in Texas] only effect would be to cast aspersions upon the Defendant and to imply that because he was involved in the Texas trouble he is a person of evil character who would be likely to commit such a crime as the robbery here charged. The very purpose of excluding such evidence is to prevent the prosecution from smearing an accused by showing a bad reputation and relying on that for conviction....

To the same effect is State V. Kazda, 14 U.2d 266, 382 P. 2d 407 (1963) in which the prosecutor elicited testimony concerning a conversation the Defendant had with an FBI agent, the agent implicating the Defendant in other crimes for which he had not been convicted. The Court held such constituted prejudicial error, holding as follows:

We deem the foregoing to constitute prejudicial error. It implied that the Defendant was implicated in other crimes none of them proven, and could have no other effect than to degrade the Defendant and give the jury the impression that he had a propensity for crime; 382 P.2d at 409.

The exceptions to the general rule are where the evidence serves some legitimate purpose as to proof of the crime, or in bearing on the credibility of evidence, in combination with the trial court's admonishing the jury about the purpose for which the evidence is admitted. State v. Green, Supra; State v. Brown, No. 15328 filed March 27, 1978 in the Supreme Court of the State of Utah; and State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974).

Neither of those exceptions are applicable to the instant case. The record of appellant Gray's trial reflects no objection to evidence of prior misdeeds, convictions or parole and does

not reflect that the evidence was stricken. The jury was allowed to consider all the evidence without cautionary instructions. It is abundantly plain that the evidence in question had no probative value whatsoever, its only possible effect and purpose being to cast aspersions on the Defendant and to indicate criminal propensity.

If the State claims objection to this evidence was waived, Appellant's response is twofold. First, failure to object only demonstrates that appointed trial counsel was not competent. In fact, trial counsel himself elicited from cross examination of a state witness that Appellant had previously been in prison (T. 53-54), but that was only after the prosecuting attorney had established the fact. That raises the second point. Even absent failure to object, this conduct of the prosecuting attorney is so blatant and absent a legitimate purpose that appellant contends this Court should characterize it as misconduct and grant a new trial on that ground alone.

In State v. Hodges, 30 U.2d 367, 517 P.2d 1322 (1974), Justice Crockett made the following statement, at 30 U.2d 369:

The asking of the question about which the Defendant complains... is certainly not to be commended; and we are made to wonder why the prosecuting attorney would ask it.

Appellant submits that the answer to that question lies in a circumstance which distinguishes this case from substantially all others dealing with this issue. In Hodges, Kazda, Green, Dickens, all supra, the defendant had taken the stand and the questions

or testimony complained of was in the nature of rebuttal. The prosecutors ask such questions, then, to refute a defense or attack credibility. If sometime they overstep the bounds of propriety, yet their motive is valid, and the critical enquiry should be "whether there is a reasonable likelihood that the incident so prejudiced the jury that in its absence there might have been a different result; State v. Hodges, supra, at 369."

In the instant case, however, appellant submits that it is not a question of whether elicitation of such degrading information by the prosecuting attorney in the States case in chief is to be commended, but whether such conduct will be tolerated by this Court at all.

The answer should be a resounding "No," and communicated to prosecutors statewide by a succinct reversal.

Nor can it avail the State to claim the information was not prejudicial because the defendant took the stand and thus his felony record could have been explored in any event. Appellant may have chosen not to testify in order to prevent the jury from learning of his record had not it already been established by the State.

In summary of this issue, appellant contends that coupled with the dearth of direct and clear-cut evidence linking defendant to the crime the jury could easily have relied on the Defendant's criminal history to adjudge him guilty. Not only was there a reasonable likelihood that the trial would have had a different result, in fact, the record reflects a strongly compelling likelihood of acquittal.

CONCLUSION

Appellant submits that the foregoing errors, each sufficient to justify reversal, combined to deprive him of a fair trial and due process of law. This Court should reverse and remand for a new trial.

Respectfully submitted.

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CERTIFICATE

I hereby certify that I delivered 2 copies to the Office of the Attorney General, State Capital Building, Salt Lake City, Utah on the 25 day of June, 1978.

MARTIN VERHOEF