1978

State of Utah v. James M. Gray : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

JAMES M. GRAY,

Defendant-Appellant.

Case No. 15550

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE [illegible] JUDICIAL DISTRICT COURT, IN AND FOR [illegible] COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE, PRESIDING

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STATE OF UTAH

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STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	Case No. 15550
JAMES M. GRAY,	:	
Defendant-Appellant.	:	

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with burglary, a felony of the second degree, in violation of § 76-6-202, Utah Code Annotated (1953) as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury in the Fourth Judicial Court of Utah County, the Honorable Allen B. Sorenson presiding, on November 1, 1977. Appellant was found guilty and sentenced to serve a term of one to fifteen years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment of the lower court.

STATEMENT OF THE FACTS

On the evening of September 18, 1977, at approximat 7:00 p.m. in the evening, appellant and one James Richard Butters burglarized a trailer situated on a construction site and occupied by one Charles LeRoy Stanley, the superintendent of construction on that site. Mr. Stanley was out of town at the time the burglary occurred. After breaking the windo on the door of the trailer and breaking open two side compartments, appellant and Butters removed several items belonging to Mr. Stanley from the premises.

At the trial, the State called, among others, Kent Curtis (Tr. p. 27), an Adult Probation and Parole Officer for the State of Utah, who had been with the investigating officers at the time appellant was brought in for questionin and subsequently participated in the search of the motel roo where several of the stolen items were recovered. In establ foundation for this witness, the prosecutor asked Kent Curtis to state his name and his occupation (Tr. p. 27). Mr. Curtis then recited his name and stated that he was a Probation and Parole Officer for the State of Utah (Tr. p. 2

The prosecutor then asked how long Mr. Curtis had known appellant to which the witness respondent "approximately ten years." (Tr. p. 28). Mr. Curtis then proceeded to testify about the search made by himself and Officers Lance and Downard (Tr. p. 28).

During the cross-examination of State's witness, Ronald Ziegler, later in the trial, defense counsel, asked Mr. Ziegler how long he had known appellant, to which Mr. Ziegler respondent, "about a little over two and a half years." (Tr. 53). A subsequent inquiry was made as to where the witness and appellant had first met and Mr. Ziegler replied, "At the prison." (Tr. p. 54).

The jury returned a verdict of guilty and appellant was sentenced to serve a term of one to fifteen years at the Utah State Prison.

ARGUMENT

POINT I

APPELLANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS REPRESENTATION BY APPOINTED COUNSEL MET THE REQUIRED STANDARD OF A COMPETENT MEMBER OF THE BAR RENDERING REASONABLE EFFECTIVE ASSISTANCE.

Several Utah Supreme Court cases hold that when an appellant is claiming he has been denied effective represenation, the court must look to the record to determine

if appellant's contention has merit. State v. Farnsworth, 1 Utah 2d 103, 368 P.2d 914 (1962); State v. Dodge, 19 Utah 2d 44, 425 P.2d 781 (1967); and State v. Heath, 27 Utah 2d 13, 492 P.2d 978 (1972). Justice Crockett summarized this frequent objection raised by appellants in the recent case o State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974) when he said:

> "In regard to the defendant's contention that he was denied effective counsel: we are impelled to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service, when the real difficulty was that he had a guilty client. In this respect also defendant had his entitlement of adequate representation by capable and conscientious counsel." Id. at 1315

Nothing in the present record indicates that appellant was denied effective counsel. Appellant contends, however, that his representation was so ineffective that it failed to meet the standard of reasonably effective assistan rendered by a competent member of the Bar. Appellant bases his argument on several aspects of the conduct of the trial, concluding that even though any one matter in and of itself might not require a reversal, the entire transcript presents a picture of a completely inadequate defense. This argument is not sustained by the record or cases dealing with the iss

This Court enunciated in Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969), the test to be used whenever the question of ineffective counsel is raised. In Alires, the court first stated that the right of an accused to counsel is included in the concept of due process of law, embodied as it is in the United States and Utah Constitutions. The requirement of counsel, said the Court:

> " . . . is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused." Id. at 242.

Immediately following the above statement, the court indicated the standard required by due process to be applied to appointed counsel:

> "The entitlement is to the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the defendant and present such defenses as are available to him under the law and consistent with the ethics of the profession." Id. at 121.

This standard has been consistently reaffirmed by the Utah Supreme Court. See Johnson v. Turner, 24 Utah 2d 439, 473 P.2d 901 (1970); Kryger v. Turner, 25 Utah 2d 214, 479 P.2d 477 (1971); State v. McNicol, 554 P.2d 203 (Utah 1976).

The specific occurrences cited by appellant in support of his argument that he received ineffective assistance do not establish a sham or pretense of an appearance by the attorney representing him, nor is there any reflection in the record of a lack of concern about the interests of appellant.

Appellant contends that his defense counsel failed to make proper objections to admission of certain evidence, failed to satisfactorily cross-examine witnesses, failed to adequately probe possible defenses, and failed to exclude witnesses during the trial. All of these matters are often a method of trial strategy, individual to each attorney, and cannot be said to indicate lack of concern by the attorney for his client or ineffective representation. See State v. McNi 544 P.2d 203 (Utah 1976), where the court concluded that failure to object, brief direct examination and failure to pursue certain matters fell "within the ambit of an attorney' legitimate exercise of judgment as to trial tactics or strate and State v. Farni, 112 Ariz. 132, 539 P.2d 889 (1975) where the court concluded that failure of defense counsel to cross-examine one witness and question others on certain points was tactical decision.

Appellant contends that the trial record, read as a whole, reflects a completely inadequate defense requiring reversal and a new trial. Appellant states that "[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," thereby suggesting to the court that it read the trial transcript in part or in its entirety.

Respondent would join in this request to the Court. However, respondent submits that the record satisfies the standard established in Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969), i.e. of reasonably effective assistance rendered by a competent member of the Bar.

If the court should find that any of the particulars raised by appellant herein do not meet the above standard, one further inquiry must be made. The court must determine whether there is some basis for believing that a better representation by counsel would have been advantageous to appellant at trial. As the court stated in Alires v. Turner, supra:

> "This is so because it is the policy of our law established both by statute and decision that we do not reverse for mere error or irregularity, but only where it is substantial and prejudicial." Alires v. Turner, 22 Utah 2d 118, 120.

The particular matters cited by appellant as evidence of ineffective representation by defense counsel

cannot be said, standing alone or as a whole, to have had such an effect upon the result - appellant's conviction of burglary - as to require a new trial. Assuming for the sake of argument that the defense attorney herein failed to make proper objections to admission of certain evidence, failed t satisfactorily cross-examine witnesses, failed to adequately probe defenses, and failed to exclude witnesses during trial there is no viable reason to believe that the verdict would have been different.

Appellant's allegations of ineffectiveness and prejudice are merely speculative and are not a demonstrable reality. Therefore, ineffectiveness of counsel is merely speculative at this point and the burden of proof still rests clearly upon appellant. In State v. McNicol, 554 P.2d 203 (Utah 1976), this court stated:

> "A defendant bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter." Id. at 204.

In the instant case, the trial record reflects tha appellant was properly represented by counsel so as not to impair any of his constitutional rights. Appellant exercise the right, through counsel, to confront witnesses against hi

Appellant exercised the right to take the witness stand on his own behalf. The appellant was granted a speedy trial before a jury.

The record on appeal and the transcript of the trial support respondent's contention that appellant herein was given legal representation by his appointed counsel which satisfies the standard set by the Utah Supreme Court. Appellant's defense attorney rendered reasonably effective assistance of counsel as a competent member of the Bar. None of the matters cited by appellant in arguing that his representation was so ineffective as to not meet the standard set forth in Alires v. Turner, 22 Utah 2d 118, 449 P.2d 241 (1969), either standing alone or as a whole, could be said to have had such an effect on the verdict as to require a reversal.

POINT II

REPORTING OF CLOSING ARGUMENT IN TRIAL IS NOT CUSTOMARILY DONE UNLESS SO REQUESTED BY COUNSEL AND FAILURE OF COUNSEL TO REQUEST REPORTING OF CLOSING ARGUMENTS IS OFTEN A PLANNED STRATEGY OR TRIAL TACTIC AND THEREFORE APPELLANT HAS NOT BEEN DEPRIVED OF HIS RIGHT TO APPEAL.

Appellant contends that failure to report closing arguments has deprived him of his constitutional right to appeal. Appellant further contends that the essence of the right to appeal is that of review in search of error, State v. McLaughlin, 22 Utah 2d 321, 324, 452 P.2d 75 (1969), and argues that this requires a review of the entire proceedings in the lower court (Appellant's brief, p. 7).

Utah Code Ann. § 78-56-2 (1953), as amended, provides:

> "[I]t shall be the duty of the shorthand reporter to attend all sessions of the court, and to take full stenographic notes of the evidence given and of all proceedings had therein except when the judge dispenses with his services in a particular cause or with respect to a portion of the proceedings thereof . . . ."(Emphasis added.)

Respondent submits that the wording of the stat allows the decision of whether the entire proceedings sh be reported to be within the discretion of the judge and

counsel. It is not customary in Utah for the court stenographer to report the closing arguments of counsel unless a request is made by counsel to do so or the matter is a capital case. See Lane v. State, 247 So.2d 679 (Ala. 1971), where the court, in interpreting a statute similar to our own, determined that the statute did not require the court reporter to make full stenographic notes of the arguments of counsel.

The general rule (see 82 C.J.S. § 9 at 1057) is that the duties of the court stenographer are prescribed by statute and as an official under the control of the court, he is subject to its discretion. See McCoy v. State, 2 S.W.2d 242 (Texas, 1927). In the absence of a constitutional or statutory provision to the contrary, and absent a request by one of the parties, it is discretionary with the court whether full stenographic notes of the arguments will be taken. The duties of the stenographer include attending court, being present or within call throughout the entire trial, except during the arguments of counsel [see Magoohan v. Curran, 42 A. 656, 71 Conn. 551 (1899), and State v. Baum, 47 Utah 7, 151 Pac. 518 (1915)] so that the courts and litigants can be protected by a complete record.

As appellant contends, an appellate court can reverse due to errors committed by counsel during his argument; however, to do so it must have the record of the closing arguments before it on appeal. It is well settled that the court on appeal is bound by the record as certified and it can only take notice of that which is part of the record as certified and transmitted. Bradley v. Lewis, 92 P.2d 399 (1939); Mary Jane Stevens Co. v. Foley, 248 Pac. 815 (1926).

During closing argument, counsel makes a summation of the evidence previously presented to the court and whether or not counsel wishes to have the closing arguments reported and therefore part of the record, is often a strategy or trial tactic used analogous to choosing whether to be tried before a judge and jury or a judge alone; whether to testify or exercise the constitutional right to remain silent; whether to call witnesses to testify on defendant's behalf, etc. While an attorney may be criticized for his judgment as to those matters, an exercise in bad judgment, i.e., a poor choice, is not grounds for reversal.

Although the closing arguments were not transcribed, appellant is not without an alternative

remedy prior to appeal. Depositions could have been taken of the trial attorney and the prosecutor to determine the content of the closing arguments of trial and these depositions could have been designated as part of the record on appeal. Yet appellant contends this failure to report closing arguments has deprived him of his constitutional right to an appeal of the entire record and in addition to exercising his alternative, i.e., obtaining depositions, fails to show prejudice or unfairness as a result of this failure to report closing arguments in his brief. Furthermore, he has failed to establish that failure to record closing arguments affected the outcome of the trial, or because of comments made during the closing arguments, review on appeal.

Thus, respondent submits that appellant's contention is without merit on two grounds: First, as a general rule, reporting of closing arguments is not customarily practiced but is discretionary with the judge and counsel; and secondly, the discretionary choice to request reporting of closing arguments is often used as a strategy or trial tactic of the particular attorney in charge of the case.

POINT III

EVIDENCE ADMITTED AS TO THE OCCUPATION OF ONE OF THE STATE'S WITNESSES AND A STATEMENT AS TO THE FACT THAT APPELLANT HAD BEEN IN PRISON WERE ISOLATED, UNHIGHLIGHTED COMMENTS AND NOT PREJUDICIAL TO APPELLANT AND THEREFORE NOT GROUNDS FOR REVERSAL ON APPEAL.

Appellant contends that the introduction of evidence revealing that State's witness Kent Curtis was an Adult Probation and Parole Office and had known the appellant for approximately ten years and the subsequent statement by State's witness Ronald Ziegler on cross-examination by then defense attorney Nash that he had met appellant in prison were statements received as evidence through prosecutorial misconduct and thus constitute prejudicial error.

Respondent submits that appellant's contention is both inaccurate and incorrect for the following reason First, the comment made by witness Ziegler was heard on cross-examination of that witness by the defense attorney for appellant. Assuming as respondent contends that appellant's trial counsel was effective and provided reasonably competent representation, it may well be that he chose to either discredit the State's witness, rather than defendant, by introducing the fact that Ziegler had also been in prison or to let the statement

remain insignificant and uncommented upon in order to avoid emphasizing the matter before the jury by making a motion to strike. If the defense attorney's failure to object was purposeful and he was giving competent representation as respondent contends, then that action constitutes a waiver and bar to raising that issue for review on appeal. Watkins v. State, 560 P.2d 921 (Nev. 1977); State v. French, 531 P.2d 373 (Mont. 1975); Mullin v. State, 505 P.2d 305 (Wyo. 1973). On the other hand, if the defense attorney's failure to object was not purposeful, then the comment, standing alone, was so insignificant as to constitute harmless error. See State v. Archuletta, 577 P.2d 547 (Utah 1978).

In the recent case of United States v. Sigal, 572 F.2d 1320 (9th Cir. 1978), comments made by a prosecutor regarding defendant's failure to testify were determined by the court to be harmless error. In Sigal, which can be analogous to the comments made in this case, the court stated:

> "Here the comment was not extensive, there was minimal stress . . . and there was no substantial evidence which supported an acquittal." Id. at 1323.

Thus, the comment made by witness Ziegler was but an isolated, unhighlighted statement and therefore not prejudicial to appellant.

As to appellant's second contention that the prosecutor intentionally introduced evidence that the Adult Probation and Parole Officer, Kent Curtis, had known the appellant for ten years, thus implicating that appellant had a prior conviction for a crime and had been in prison, it is a general rule that a witness may be examined about his background, occupation, and the like for the purpose of aiding the jury in evaluating his testimony and credibility. State v. Brewer, 549 P.2d 188 (Ariz. 1976). In the instant case, witness Curtis was asked simply to state his name, occupation, and how long he had known the defendant. Here again the failure of the defense attorney to object could have been trial strategy; perhaps he did not want to stress the fact and felt it was unnecessary to object. Assuming as respondent contends, that defense counsel was an effective attorney, rendering reasonable, competent representation, if he failed to voice objection he cannot raise the issue for review on appeal. Further, Utah Code Ann. § 78-24-9 (1953), as amended, provides that "a witness must answer as to the fact of his previo

conviction of felony," and thus the prosecution had the right, sanctioned by statute, to adduce evidence of appellant's prior felony convictions once appellant took the stand; therefore appellant's contention is without merit. Also, had the evidence been directly introduced rather than as it was, by inference, the evidence of prior convictions for burglary could have been admitted to show intent, knowledge, or absence of mistake or accident. See Rule 55, Utah Rules of Evidence, and State v. Crowley, 552 P.2d 971 (Kan. 1976). In addition, the evidence of prior convictions could have been introduced to impeach appellant's credibility once he had taken the stand. Rule 21, Utah Rules of Evidence, allows evidence of crimes involving dishonesty or false statement to be introduced for purposes of impeaching a witness' credibility. In State v. Crowley, 552 P.2d 971 (Kan. 1976), the court stated:

> "Burglary and larceny are crimes involving dishonesty and conviction of those offenses may be shown for purposes of impairing the credibility of a witness." Id. at 975.

Thus, the comments adduced by the prosecutor were elicited during fundamental foundation questions to the State's witness; they were not emphasized nor highlighted by further testimony and therefore are not prejudicial to appellant.

In a recent Utah case, State v. Hodges, 30 Utah 2d 367, 517 P.2d 1322 (1974), the prosecuting attorney had inquired as to whether the defendant, on trial for robbery and assault with a deadly weapon, had used the same gun to perpetrate another robbery. Yet even these comments, certainly more serious than those made in the instant case, were not enough to reverse the conviction. In Hodges, the Court stated:

> ". . . there should be no reversal of a conviction merely because of error or irregularity, but only if it is substantial and prejudicial in the sense that in its absence there is a reasonable likelihood that there would have been a different result." (Emphasis added.) Id. at 1325.

Respondent contends that the comments complained of by appellant were not objected to at trial by his defense attorney, who respondent believes effectively represented appellant in a reasonable, competent manner, and therefore are not an issue that can be raised on appeal. Respondent further contends that the comments were isolated, unhighlighted comments and thus not prejudicial to appellant.

CONCLUSION

Respondent respectfully submits that in view of the arguments presented above, appellant's conviction of burglary should be affirmed.

Respectfully submitted,

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