

1978

State of Utah v. Jack Warren Nomeland and Donald Farrell : Appellant's Brief

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
Plaintiff-Respondent,)
)
v.)
)
JACK WARREN NOMELAND)
and DONALD FARRELL,)
Defendant-Appellants.)
)

Case No 15556

APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court of Utah County
Honorable J. Robert Bullock, Judge

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TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE.....	1
DISPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	3
POINT I: THE TRIAL JUDGE ERRED IN GIVING INSTRUCTION NUMBER THIRTEEN, IN THAT, SUCH INSTRUCTION WAS TANTA- MOUNT TO COMMENTING ON DEFENDANT NOMELAND'S FAILURE TO TESTIFY...	3-4
CONCLUSION.....	5

CASES CITED

Griffin v. California, (1965) 380 US 609, 14 LED 106, 85 S Ct, 1229,
Reh. den. 381 US 957, 85 S Ct, 1797,
14 L Ed 2d 730..... 3

Gross v. State, (Indiana 1974) 306 N.E. 2d 371..... 3

Russell v. State (1966) 240 Ark 97, 398 S.W. 2d 213..... 4

Mosby v. State, (Ark 1969) 440 SW 2d 230..... 4

People v. Hampton, 394 Mich 437, 231 N.W. 2d 654 (1975)..... 4,5

State v. Cousins, 4 Ariz. App. 318, 420 P 2d 185 (1966)..... 5

State v. Faragosa, (1967) 6 Ariz. App. 80, 430 P. 2d 426..... 5

STATUTES CITED

U.C.A. § 76-6-202 (Supp. 1977)..... 1

OTHER AUTHORITIES CITED

United States Constitution, 3,5

Utah State Constitution, Article I, Section 12..... 3,5

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
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Plaintiff-Respondent,)	
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v.)	
)	CASE NO. 15556
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JACK WARREN NOMELAND)	
and DONALD FARRELL,)	
)	
Defendant-Appellants.)	
)	

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Burglary, in violation of Utah Code Annotated § 76-6-202 (Supp. 1977).

DISPOSITION IN THE LOWER COURT

The matter was tried in the Fourth Judicial District Court, in and for Utah County, before the Honorable J. Robert Bullock, District Judge, with a Jury. Defendants were both convicted of the crime charged and sentenced to one to fifteen (1-15) years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of their convictions or failing that, a new trial.

STATEMENT OF THE FACTS

The Information charged that on or about the ninth day of November, 1977 the said defendants unlawfully entered a dwelling belonging to Florean Rebecca Dodds with intent to commit theft therein, in violation of the Utah Criminal Code, § 76-6-202.

Trial was set for the ninth day of November, 1977, with a Jury. The State called five witnesses to establish their case. The Defense called to the stand Donald Michael Farrell. Co-defendant, Jack Warren Nomeland did not take the stand. Following Mr. Farrell's testimony the defense rested and the case was submitted to the jury.

The Court instructed the jury in Instruction No. 13 of the Court's Instruction that:

"A defendant in a criminal case is not required to testify in his own behalf. The law expressly gives him the privilege of not testifying if he so desires. The fact that defendant Jack Warren Nomeland has not taken the witness stand must not be taken as any indication of his guilt, nor should you indulge in any presumption or inference adverse to him by reason thereof. The burden remains with the state, regardless of whether the defendant testifies in his own behalf or not, to prove by the evidence his guilt beyond a reasonable doubt."

The defendants had not requested such an instruction but took exception to the instruction. (T. p. 55)

ARGUMENT

THE TRIAL JUDGE ERRED IN GIVING INSTRUCTION NUMBER THIRTEEN, IN THAT, SUCH INSTRUCTION WAS TANTAMOUNT TO COMMENTING ON DEFENDANT NOWELAND'S FAILURE TO TESTIFY.

The Fifth Amendment to the United States Constitution and Article I, § 12 of the Utah Constitution provide that a defendant cannot be compelled to give evidence against himself.

In 1965, the United States Supreme Court found the Fifth Amendment to forbid either a comment by the prosecution on an accused's silence or an instruction by the Court that such silence is evidence of guilt. Griffin v. California, (1965) 380 US 609, 14 L Ed 2d 106, 85 S Ct. 1229 Reh. den. 381 US 957, 85 S Ct. 1797, 14 L. Ed 2d 730.

In Griffin, the trial court instructed the Jury that a defendant has the constitutional right not to testify. As to the issue of guilt, the court further stated:

"As any evidence of facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify, or if, though he does testify, he fails to deny or explain such evidence, the Jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The decision to testify is often used as a trial tactic. For various reasons an accused and his counsel may decide that it is best that the accused exercise his right not to testify. In order for the privilege to be fully realized, it is essential that no aspersions whatsoever be cast upon the accused for his failure to testify. Cross v. State (Indiana 1974) 306 NE 2d 371.

The Court in Cross v. State instructed the Jury that:

"The defendant is a competent witness to testify in his own behalf. But if the defendant does not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same..."

The Indiana Court found that where the court intends to give such an instruction and the defendant objects, the giving of the instruction constitutes an invasion of the defendant's Fifth Amendment rights and judicial error.

In Russel v. State (1966) 240 Ark. 97, 398 SW 2d 213, the Arkansas Supreme Court faced a similar case but involving three defendants instead of two. None of the accused took the stand. The Court over the objection of the defendant told the jury that the accused had a right to testify or not to testify and that their failure to do so was not evidence of guilt and was not to be considered by the jury.

The Court found error committed and declared:

"If the accused is to have the unfettered right to testify, he should have the correlative right to say whether or not his silence should be singled out for the jury's attention."

The Court found such to be reversible error.

Following Russell v. State, an Arkansas murder defendant appealed his conviction in Mosby v. State, (Ark. 1969) 440 SW 2d 230. There the trial court gave the following instruction:

"A defendant may or may not testify in a case at his own discretion. The fact that a defendant did not testify is not evidence of his guilt or innocence and is in fact no evidence at all and is not to be considered by you in arriving at your verdict."

The Court found the instruction to be prejudicial error and reversed, citing Russell v. State.

See also, People v. Hampton, 394 Mich 437, 231 N.W. 2d 654 (1975).

In People v. Hampton, the defendant requested the instruction not be given but the court nevertheless gave the instruction that "no inference of guilt arises from the defendant's failure to take the stand". The Court found such to reversible error.

Arizona has found it reversible error to instruct on the subject unless the defendant requests such an instruction. State v. Cousins, 4 Ariz. App. 318, 420 P 2d 185 (1966); State v. Faragosa (1967) 6 Ariz. App. 80, 430 P. 2d 426.

CONCLUSION

The Court, by giving Instruction Number Thirteen (13) effectively commented on the defendant's failure to take the stand, thereby, violating the defendant's constitutional rights as guaranteed by the Fifth Amendment to the United States Constitution and Article I, Section 12 of the Utah Constitution.

RESPECTFULLY SUBMITTED,

UTAH COUNTY LEGAL DEFENDER ASSOC, INC.

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Attorney for Defendant-Appellants

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