1986

State of Utah v. Williams Silas Case : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 860263
-v-	:	
WILLIAM SILAS CASE,	:	Priority No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF AGGRAVATED ASSAULT, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR TOOELE COUNTY, STATE OF UTAH, THE HONORABLE JOHN A. ROKICH, JUDGE, PRESIDING.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Did the trial court properly admit into evidence the preliminary hearing testimony of defendant's victim?

2. Has defendant demonstrated that reversible error occurred when the trial court admitted evidence that defendant alleges was obtained pursuant to an unlawful warrantless search?

STATEMENT OF THE CASE

Defendant, William Silas Case, was charged with aggravated assault, a third degree felony, under UTAH CODE ANN. § 76-5-103 (1978) (R. 5). After a jury trial, he was found guilty of that offense (R. 42). The court sentenced him to a term of zero to five years in the Utah State Prison (R. 43).

STATEMENT OF FACTS

Because the testimony of the State's key witness, the victim of defendant's aggravated assault, does not appear in the trial transcript (T. 31), or any other part of the appellate

record filed in this Court,[1] the State is unable to set forth, by reference to the record, the essential facts of the crime of which defendant was convicted. However, given that defendant carries the burden on appeal to demonstrate that reversible (as opposed to harmless) error occurred, State v. Jones, 657 P.2d 1263, 1267 (Utah 1982), and that one of his assignments of error requires no detailed recitation of the facts, it is sufficient to state that this prosecution and conviction arose out of an incident that occurred at the Oquirrh Motel in Lakepoint, Utah on February 6, 1986 wherein a bloodied and battered woman ran nude from a room that she occupied with defendant (T. 47-63).

SUMMARY OF ARGUMENT

Under existing case law from this Court and the United States Supreme Court, and the pertinent rule of evidence, the trial court properly admitted the preliminary hearing testimony of an unavailable witness for the State.

Even if it were assumed that the trial court erroneously refused to suppress certain evidence seized during a warrantless search, defendant fails to demonstrate that that was prejudicial error.

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[1] The tape recording of the victim's preliminary hearing testimony was played at trial; however, that testimony has not been transcribed for appeal, nor has the recording (State's Exhibit 40) been made a part of the record on appeal.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE PRELIMINARY HEARING TESTIMONY OF DEFENDANT'S VICTIM.

Defendant argues that the trial court incorrectly admitted the preliminary hearing testimony of Suzanne McPhearson, the victim of defendant's crime, and that this error requires reversal of his conviction. He contends that the court erroneously determined that McPhearson was an "unavailable witness" and thus violated his constitutional right of confrontation by admitting her former testimony at trial.

Utah R. Evid. 804(b)(1) allows the admission of former testimony of an unavailable witness as an exception to the hearsay rule. Rule 804(a)(5) defines "unavailability as a witness" as a "situation[] in which the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." Defendant's position is that the State failed to make reasonable efforts to secure the attendance of McPhearson at trial as required by Rule 804 and State v. Brooks, 638 P.2d 537 (Utah 1981), where this Court stated:

> Defendant's right to confrontation is guaranteed by the Utah Constitution, Article I, Section 12, and by the Sixth Amendment to the United States Constitution.
>
> In the context of federal constitutional law, the court in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), (hereinafter Roberts) outlined a two-pronged test to determine the admission of prior testimony in relationship to confrontation

considerations. The first requirement is that the witness must be unavailable; the second requirement is that the testimony must bear sufficient indicia of reliability to permit its introduction at trial. Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 38 L.Ed.2d 293 (1972); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Barber v. Page 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968); Pointer v. Texas, 380 U.S. 400, 88 S.Ct. 1065, 13 L.Ed. 2d 923 (1965); Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). See also State v. Mannion, 19 Utah 505, 57 P. 542 (1899).

A state may construe its own constitution more narrowly than the federal constitution even though the provisions involved may be similar. Nonetheless, the two-pronged test in Roberts appears to be a correct and reasonable standard to this court.

In State v. Oniskor, 29 Utah 2d 395, 510 P.2d 929 (1973), we held that the testimony of an unavailable witness given at the preliminary hearing could be used at trial provided prosecutorial authorities have made a good faith effort to obtain his presence at trial. The rule of review enunciated in Gallegos v. Turner, Utah, 526 P.2d 1128 (1974), is that we will not reverse the ruling of the trial judge that the efforts were made in good faith in the absence of a showing of clear abuse of discretion.

638 P.2d at 539.

The State presented the following evidence concerning its efforts to secure Ms. McPhearson's attendance at trial. Sherry Brown, a legal secretary with the Tooele County Attorney's Office, personally served a subpoena on McPhearson for the preliminary hearing while McPhearson was in a local hospital shortly after the crime. After McPhearson had testified at the preliminary hearing, Brown verbally informed her of a tentative trial date with the understanding that McPhearson would shortly

thereafter give the county attorney's office an address to which a "reminder" subpoena could be sent. Subsequently, McPhearson contacted the county attorney, and a subpoena was sent to her in Mobile, Alabama. McPhearson acknowledged receipt of the subpoena four days after it was sent in a telephone conversation with Brown. During that conversation, Brown reviewed the date and location of the trial with McPhearson and received assurances from her that she would attend. In the following weeks before trial, Brown talked with McPhearson approximately eight times about the trial, each time receiving a commitment from McPhearson that she would attend voluntarily. It was not until the morning of trial that Brown learned from a police officer that McPhearson would not be appearing. The officer had received a long distance phone call from McPhearson that morning, and McPhearson had indicated that she would not be at trial because "she was afraid of the defendant in the matter and . . . couldn't bring herself to come in" (T. 14-19, 21-24). Finally, the prosecutor did not utilize the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings" (hereinafter "Uniform Act"), found in UTAH CODE ANN. § 77-21-1 et seq. (1982) (T. 3).

With the foregoing evidence before it, the trial court ruled that McPhearson's preliminary hearing testimony would be received in her absence (T. 28). This ruling was entirely consistent with this Court's decision in State v. Chapman, 655 P.2d 1119, 1123-24 (Utah 1982), which held that the trial court did not abuse its discretion in ruling that an out-of-state

witness was "unavailable" and that his preliminary hearing testimony was admissible when the witness had acknowledged receipt of a subpoena in the mail and the prosecutor had no reason to question his availability prior to seven days before trial. Chapman further held that there was no inflexible requirement that the Uniform Act be utilized as a condition precedent to the use of prior testimony. Under Chapman, the State made reasonable and good faith efforts to secure McPhearson's attendance at trial. It had no reason to believe that she would not appear until the morning of trial. Accordingly, this Court should uphold the lower court's decision concerning McPhearson's preliminary hearing testimony. Defendant simply has failed to show any abuse of discretion, let alone a clear abuse of discretion -- the relevant standard of review. Gallegos v. Turner, 526 P.2d 1128, 1129-30 (Utah 1974).

POINT II

DEFENDANT FAILS TO DEMONSTRATE THAT THE TRIAL COURT'S REFUSAL TO SUPPRESS CERTAIN EVIDENCE REQUIRES REVERSAL OF HIS CONVICTION.

In Point I of his brief (Brief of Appellant at 4-11), defendant argues that the trial court committed error when it admitted evidence obtained in a warrantless search of his motel room by police officers shortly after McPhearson had run from that room. Beyond his failure to identify specifically the evidence he claims was improperly admitted,[2] defendant is guilty

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[2] For instance, defendant appears to challenge the admissibility of photographs that were taken during the search; however, after making his motion to suppress at trial, he stipulated to the admission of those photographs (T. 75).

of an even more basic error on appeal: he fails to present any argument that the allegedly erroneous admission of the challenged evidence constituted reversible error in light of all the evidence presented. It is a fundamental rule that the erroneous admission of evidence may nevertheless be harmless error. See State v. Nickles, 43 Utah Adv. Rep. 20, 24, ____ P.2d ___, ___ (1986) (citing State v. Hutchison, 655 P.2d 635 (Utah 1982)); Utah R. Evid. 103(a); Utah R. Crim. P. 30(a).

Given this Court's decision in State v. Harris, 671 P.2d 175 (Utah 1983), and the well established principle in Utah that, with respect to police searches, a motel room is afforded protection similar to that given one's home, State v. Folkes, 565 P.2d 1125, 1127 (Utah 1977), cert. denied, 434 U.S. 971, the State must concede that, under the facts presented, there is some question whether the evidence obtained in the warrantless search of defendant's room should have been suppressed under Utah R. Crim. P. 12(g), the rule that controls such questions. However, even if error were assumed in this regard, reversal is not warranted. Defendant has provided the Court with no meaningful appellate record of Ms. McPhearson's testimony which, it seems obvious from a review of the trial transcript, must have been the bulk of the State's evidence against him. Consequently, the Court has no means of reviewing the sufficiency of the State's evidence absent that which defendant challenges or of determining whether there likely would have been a different result in defendant's trial without the alleged evidentiary error. Nickles, 43 Utah Adv. Rep. at 24; Utah R. Evid. 103(a); Utah R. Crim. P. 30(a).

Furthermore, defendant is not able to show, by reference to the appellate record, that he was prejudiced by the alleged erroneous admission of evidence -- something that he is obliged to do on appeal. Ibid. See also State v. Griffin, 626 P.2d 478, 483 (Utah 1981) (Wilkins, J., concurring in the result) (holding that introduction of fruits of unlawful search and seizure was harmless error, in that there was sufficient untainted evidence to sustain the defendants' convictions). Because defendant has failed to carry the burden of demonstrating that reversible error occurred below, Jones, 657 P.2d at 1267 (due either to an inability to do so or to the absence of an adequate record on appeal, see State v. Wulffenstein, 657 P.2d 289, 293 (Utah 1982), cert. denied, 460 U.S. 1044 (1983)), the Court should hold that, even if it were assumed the trial court erred in admitting the challenged evidence, defendant has not presented grounds for reversal of his conviction.

CONCLUSION

Based upon the foregoing arguments, defendant's conviction should be affirmed.

RESPECTFULLY submitted this 29th day of December, 1986.

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MAILING CERTIFICATE

I hereby certify that four true and accurate copies of the foregoing Brief were mailed, postage prepaid, to Frank T. Mohlman, Attorney for Appellant, MOHLMAN & YOUNG, 250 South Main, Tooele, Utah 84074, this 30th day of December, 1986.

David B. Thompson