

1978

State of Utah v. Bernard Sandoval : Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

BERNARD SANDOVAL,

Defendant-Appellant.

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: Case No.
: 15714
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APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT OF THE THIRD
JUDICIAL DISTRICT COURT, OF SALT LAKE
COUNTY, STATE OF UTAH, THE HONORABLE
JAY E. BANKS, JUDGE, PRESIDING

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Clk. Supreme Court, Utah

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IN THE SUPREME COURT OF THE
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APPELLANT'S REPLY BRIEF

ARGUMENT

POINT I

RESPONDENT'S FEDERAL AUTHORITY IS FACTUALLY
DISTINGUISHABLE FROM APPELLANT'S AUTHORITY
AND THE CASE AT BAR

In its brief, respondent relies on a line of authority
distinguishing one of appellant's principal cases, De Luna v. United
States, 308 F.2d 140 (5th Cir. 1962), rehearing denied 324 F.2d 375
(1963). Respondent cites United States v. Hutul, 416 F.2d 607 (7th
Cir. 1969) and United States v. Alpern, 564 F.2d 755 (7th Cir. 1977).

In Hutul, supra, counsel for Hutul stated in his closing
argument to the jury that his client was the only one to take the stand and
that he had testified in good faith. His comments were not specifically

directed at any one of the remaining co-defendants.

The court in Hutul commented on this distinction as follows:

The nature of the prejudicial comments in De Luna differ significantly from the statements in the instant case. Hutul's attorney's comments were part of his defense that he acted in good faith and that there was no direct, but only circumstantial evidence of his participation in the fraudulent scheme. In presenting such defense, Hutul took the stand to explain his actions. Viewed in the context of the argument to the jury, then, the comments which defendants seek to isolate are seen to not be directed negatively to the other defendants' failure to testify, but rather positively to Hutul's good faith defense, a defense not offered by any other defendant. 416 F.2 at 621.

Similarly, in Alpern, supra, the comments by counsel for one of the co-defendants were not directed specifically at any one co-defendant. Conversely, in the case at bar, the comments by counsel for Morishita during his opening statement clearly were directed toward appellant Sandoval to the point of attempting to state to the jury the content of the allegedly exculpatory testimony that Sandoval would be likely to relate were he to take the stand. After objection by counsel for appellant, instructions by the court to counsel for Morishita not to call Sandoval, and cautionary instructions to the jury, counsel for Morishita proceeded in open court before the jury to call Sandoval as his first witness.

Following is a portion of the record concerning this sequence of events:

THE COURT: You may make your record, Mr. McCaughey.

MR. McCAUGHEY: Your Honor, at this time I would like to put on the record at least what my version of what happened on February 3rd--excuse me--January 13th at the conference that we had at the bench with your Honor.

It is my recollection that Mr. Rich had just--was in the process of giving his opening statement after the State had rested, and during that opening statement Mr. Rich made the statement to the jury that he intended to call Co-defendant Bernard Sandoval to the stand. And Mr. Rich began telling the jury what Mr. Sandoval would say, at which time I objected.

THE COURT: He didn't get anything out.

MR. McCAUGHEY: He did not get anything. That's right. He began, but he did not get anything. At that time I objected. The Court sustained my objection and admonished the jury to disregard what Mr. Rich said, that he could not call the Co-defendant to the stand. At that time, we had a conference at the side bar wherein Mr. Rich proffered to your Honor that Mr. Sandoval would make various statements exculpating the other two Defendants, at which time your Honor ruled that both Mr. Sand--excuse me, that Co-Defendant, Mr. Sandoval, could not testify as to what Mr. Rich had proffered at that time because of the attorney-client relationship. And the Court further ruled that he could not call him to the stand.

THE COURT: That was based on the representations of what the evidence would be.

MR. McCAUGHEY: That's correct. And the Court at that time gave Mr. Rich the opportunity, or told him that he would have the opportunity at a later time to proffer on the record what Mr. Sandoval would testify to, which later occurred, which Mr. Rich did that, and the Court upheld the same ruling that it had been issued at the side bar conference. After the conference, Mr. Rich completed his opening statement and returned to the counsel table, at which time he was directed to call his first witness.

At that time he called the Co-defendant--in front of the jury called the Co-defendant, Mr. Sandoval, to the stand, at which time I objected and made a motion, which I asked the Court permission to argue outside the presence of the jury. That request was granted, and we later argued the motion either for a mistrial, or, in the alternative, for a severance. And the court eventually denied that motion.

THE COURT: I think that it should also reflect that you affirmatively said that he wouldn't take the stand.

MR. McCAUGHEY: That's correct. The point Mr. Rich was giving in his opening statement, I had rested my case and indicated I would put on no evidence. That was the posture of the action when Mr. Rich made his statement. I think, to the best of my recollection, that's what happened at side bar and what occurred during the trial.

THE COURT: That's the Court's recollection too. (REC. pages 437 to 438).

It is apparent that the remarks by counsel for Morishita were clearly and specifically directed solely at Co-defendant Sandoval and focused the attention of the jury upon Sandoval's refusal to take the stand.

Further, respondent cites no case in support of its position wherein an attorney actually, in open court, attempts to call a Co-defendant to the stand when such Co-defendant is unwilling to testify.

POINT II

RESPONDENT'S UTAH AUTHORITY IS DISTINGUISHABLE FROM THE CASE AT BAR

While conceding that the standard for errors affecting fundamental constitutional rights is that such error must be harmless beyond a reasonable doubt, respondent proceeds to cite the harmless error rule as stated in Section 77-42-1, Utah Code Annotated (1953), which has no applicability to the case at bar. Further, respondent cites no Utah case concerning an attempt to call an unwilling defendant to the stand in open court before a jury.

In fact, State v. Lybert, 30 Utah 2d 180, 515 P.2d 441 (1973), relied upon by respondent, rules favorably for appellant on the issue of an accused's right to call an unwilling Co-defendant to the stand. In Lybert, supra, appellant contended that the trial court committed prejudicial error by refusing to allow him to call his Co-defendant as a witness in the presence of the jury. The Supreme Court of Utah, recognizing the potential for prejudicial error, stated concerning appellant's claim:

As to the defendant's second claimed error, he contends that the Court's refusal to permit him to call the

Co-defendant as a witness in the presence of the jury deprived him of his right to compulsory attendance of witnesses. The defendant further claimed that even though the co-defendant outside of the presence of the jury had claimed his privilege to remain silent, nevertheless he was entitled to have such inferences as may arise in the minds of the jury from the calling of the witness and his claiming the privilege. Under the facts of this case and the two defendants having each declined to testify, we must conclude there is no merit in this contention. 515 P. 2d at 442.

Respondent's brief fails to deal directly with the fact that counsel for appellant made his motion to sever alternatively with a motion for mistrial. Consequently, the trial court had before it the alternative of granting a mistrial should it determine that the facts involved herein were not sufficient to warrant a severance. Surely, the presumption of prejudice as to Sandoval arising from the conduct of counsel for Morishita justified, at the least, the granting of a mistrial.

CONCLUSION

On the basis of the foregoing and appellant's original brief in this case, appellant respectfully urges this Court to grant a reversal of his conviction.

DATED this 13th day of November, 1978.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify I delivered 2 copies of the foregoing Reply Brief to
the Attorney General's Office, 236 State Capitol, Salt Lake City,
Utah, this 14th day of November, 1978.


RICHARD G. MacDOUGALL