

1978

State of Utah v. Bernard Sandoval : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert B. Hansen; Earl F. Dorius; Attorneys for Respondent;

Stephen R. McCaughey; Richard G. MacDougall; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *State v. Sandoval*, No. 15714 (Utah Supreme Court, 1978).

https://digitalcommons.law.byu.edu/uofu_sc2/1192

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No. 15714
	:	
BERNARD SANDOVAL,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

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

STEPHEN R. McCAUGHEY
Attorney for Appellant
72 East Fourth South
Suite 330
Salt Lake City, Utah 84111

RICHARD G. MacDOUGALL
Attorney at Law (on brief)
321 South Sixth East
Salt Lake City, Utah 84102

Attorneys for Appellant

ROBERT B. HANSEN
Attorney General
236 State Capitol
Salt Lake City, Utah 84111

Attorney for Respondent

FILED

SEP 13 1978

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE.	1
DISPOSITION IN LOWER COURT	1
RELIEF SOUGHT ON APPEAL	1
STATEMENT OF FACTS	2
ARGUMENT	
POINT I: A DEFENDANT'S RIGHT TO REFUSE TO TESTIFY IS ABSOLUTE AND CANNOT BE USED AGAINST HIM IN ANY MANNER	3
POINT II: THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTIONS FOR MISTRIAL AND/OR SEVERANCE AND FOR A NEW TRIAL CONSTITUTED PREJUDICIAL ERROR	5
POINT III: THE ERRORS RAISED HEREIN CONCERN A FUNDAMENTAL CONSTITUTIONAL RIGHT AND ARE PRESUMED TO BE PREJUDICIAL.	7
CONCLUSION	8

CASES CITED

<u>De Luna v. United States</u> , 308 F.2d 140 (5th Cir. 1962), reh. denied 324 F.2d 375(1963).	5, 6,
<u>Martinez v. Turner</u> , 461 F.2d 261 (10th Cir. 1972).	8
<u>State v. Scandrett</u> , 24 Utah 2d 202, 468 P.2d 639 (1970)	8
<u>United States v. Echeles</u> , 352 F.2d 892 (7th Cir. 1965)	3, 4, 6
<u>United States v. Johnson</u> , 488 F.2d 1206 (5th Cir. 1973)	7

STATUTES CITED

Section 76-6-302, <u>Utah Code Annotated</u> (1953)	1
Section 77-44-5, <u>Utah Code Annoated</u> (1953)	3, 9

IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
vs.	:	Case No.
	:	15714
BERNARD SANDOVAL,	:	
	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant and two co-defendants were charged with the crime of aggravated robbery in violation of Section 76-6-302, Utah Code Annotated (1953).

DISPOSITION IN LOWER COURT

Appellant and both co-defendants were tried jointly on January 12-13, 1978, before a jury in the Third Judicial District Court of Salt Lake County. All were found guilty of the crime of aggravated robbery, a first degree felony.

Appellant was sentenced to a term of five years to life, placed on probation, and granted a stay of execution of sentence.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of his conviction on the basis that the trial court's denial of appellant's motion for severance and/or mistrial and motion for a new trial constituted prejudicial error.

STATEMENT OF FACTS

Appellant and co-defendants Carter and Morishita were charged with having committed the crime of aggravated robbery on or about the 31st day of March, 1977.

The three were brought to trial jointly on January 12, 1978. At the close of the State's case, counsel for appellant rested his case, not having called appellant to the stand.

Subsequently, during his opening statement, counsel for codefendant Morishita claimed he would call appellant Sandoval to the stand to testify and attempted to state what he thought Sandoval would say, at which point appellant's counsel objected. The Court sustained the objection and admonished the jury to disregard the matter, pointing out that a defendant could not be called to the stand involuntarily.

A conference was held at side bar during which the Court informed counsel for Morishita he could not call Sandoval as a witness and that the statements of Sandoval he wished to elicit were inadmissible under the attorney-client privilege.

Counsel for Morishita completed his opening statement, was directed to call his first witness, and, in front of the jury, he called co-defendant Sandoval. Appellant's counsel again objected and the objection was sustained. He then moved for a mistrial and/or severance, and the motion was denied.

Counsel for appellant later argued a motion for a new trial which was also denied.

ARGUMENT

POINT I

A DEFENDANT'S RIGHT TO REFUSE TO TESTIFY
IS ABSOLUTE AND CANNOT BE USED AGAINST
HIM IN ANY MANNER.

The Fifth and Fourteenth Amendments to the Constitution of the United States, and the Constitution of the State of Utah, guarantee to a defendant the right to refuse to testify in any criminal proceeding against him.

Further, Section 77-44-5, Utah Code Annoated, (1953) states that a defendant's "...neglect or refusal to be a witness shall not in any manner prejudice him or be used against him on the trial or proceeding." (emphasis added.)

The policy underlying such a guarantee is sound in that a defendant ought not to be required, in any way, to aid the State in establishing its burden of proof, nor should his exercise of the privilege be used to his detriment.

The issue of a defendant's testimonial privilege is especially poignant in the setting of a joint trial, where a defense attorney's zeal on behalf of his client may lead him to attempt to elicit exculpatory testimony from a co-defendant. Such an attempt could well serve to prejudice the interest of a co-defendant who refuses to testify.

The case of United States v. Echeles, 352 F.2d 892 (7th Cir. 1965), clearly delineates the problem. In Echeles, an attorney appealed his conviction of suborning perjury, impeding administration of justice and conspiracy.

Echeles was tried jointly with a co-defendant by the name of Arrington. Echeles was faced with the problem of being unable to call Arrington as a witness because of a defendant's testimonial privilege, while needing to enter into evidence admissions made by Arrington which would have exculpated Echeles.

In discussing the scope of the Fifth Amendment, the Court in Echeles stated:

By its first and most familiar protection, this Fifth Amendment provision gives any person the right to refuse to answer questions which might tend to incriminate him. But equally important is the 'universally held' interpretation of this right prohibiting any person who is on trial for a crime from being called to the witness stand. ³⁵²
F.2d at 897 (emphasis is original)

Concerning the right to refuse to testify, the Court states further at 897:

The second protection applies without regard to the nature of the intended inquiry; that is, a defendant on trial cannot be required to take the stand to answer even the most innocuous, non-incriminating inquiries. Nor does it make a difference whether the defendant is called to the stand by the prosecution or a co-defendant.

Clearly, a defendant's right to refuse to testify is absolute, whether he be tried jointly or separately. Thus, in the instant case, the Court's sustaining of appellant's objections and the admonition to the jury were proper and essential.

POINT II

THE TRIAL COURT'S DENIAL OF
APPELLANT'S MOTIONS FOR MISTRIAL
AND/OR SEVERANCE AND FOR A NEW
TRIAL CONSTITUTED PREJUDICIAL
ERROR.

The central issue involved in the instant case is whether appellant was prejudiced by the statements and conduct of counsel for defendant Morishita so as to deny appellant due process of law, despite the sustaining of objections by appellant's attorney and the Court's admonition to the jury.

Perhaps the mere mention of the intention to call appellant by Morishita's attorney during his opening statement was insufficient to prejudice appellant's position. The admonition to the jury to disregard the matter may have cured the prejudice.

However, certainly the actual calling of appellant by counsel for Morishita, after he was instructed not to do so, focused the attention of the jury on the implications of a defendant's refusal to testify as surely as if a direct comment on such failure were to be made by counsel. At that point, a motion for mistrial and severance should have been granted. Case law clearly favors severance in the interest of justice, fairness and impartiality.

The case of DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962), reh. denied 324 F.2d 375 (1963), involved two defendants tried jointly for violations of the Narcotic Drug Import and Export Act. Each had retained his own

attorney. At trial, DeLuna did not take the stand, but his co-defendant Gomez did testify.

Counsel for Gomez, in his closing argument, commented directly on DeLuna's failure to testify and had earlier made an indirect reference. Counsel for DeLuna objected and the trial judge instructed the jury to disregard the matter.

The Fifth Circuit Court of Appeals reversed and remanded the case for separate trials, stating:

If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
308 F.2d at 141.

While DeLuna involved a direct comment on a co-defendant's failure to testify, the rationale underlying the severance requirement applies with equal force to the instant case. The effect upon the impartiality of a jury is the same whether it derives from a direct comment as in DeLuna or from an indirect source as in appellant's case.

In Echeles, supra., the Seventh Circuit Court of Appeals, in holding that Echeles' motion for severance should have been granted, considered the prejudicial effect of calling a co-defendant to testify (citing DeLuna in support thereof).

Thus, Echeles could not properly call Arrington as a witness during Echeles' case in chief. For if Arrington declined to take the stand, as was his right, Echeles' action in calling him and forcing him to decline to do so in front of the jury would

have injected prejudicial
error into the record as to
Arrington. 352 F.2d at 898.

In United States v. Johnson, 488 F.2d 1206 (1st Cir.
1973), the First Circuit Court of Appeals affirmed defendant's
conviction for distributing cocaine and denied defendant's
claim that he be allowed to interrogate a former co-defendant
where such co-defendant would apparently invoke his Fifth
Amendment privileges. The Court stated at 1211:

"Finally, we find without merit
the claim that Johnson had a right
to have Perry called as a witness
before the jury. (citations
omitted) If it appears that a
witness intends to claim the
privilege as to essentially all
questions, the court may, in its
discretion, refuse to allow him
to take the stand. Neither side
has the right to benefit from any
inferences the jury may draw simply
from the witness' assertion of the
privilege either alone or in con-
junction with questions that have
been put to him."

POINT III

THE ERRORS RAISED HEREIN CONCERN
A FUNDAMENTAL CONSTITUTIONAL RIGHT
AND ARE PRESUMED TO BE PREJUDICIAL.

Due to the trial court's refusal to sever or grant a
motion for a new trial, appellant was denied a fundamental
constitutional right--the right to be tried by an impartial
jury.

The inference to be drawn from appellant's refusal to
take the stand after being called by counsel for Morishita

can only have influenced the jury adversely and prejudicially as to appellant.

When a fundamental constitutional right has been abused or denied, any error pertaining thereto is presumed to be prejudicial. The Supreme Court of Utah adopted this position in State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970), stating:

We think the correct view, and the one which is both practical and in keeping with the desired objective of fundamental fairness and due process of law, is that there is a presumption that such error is prejudicial, but that it can be overcome when the court is convinced beyond a reasonable doubt that it had no such prejudicial effect upon the proceedings. 468 P.2d at 643.

The Tenth Circuit Court of Appeals adopted the same standard in the case of Martinez v. Turner, 461 F.2d 261 (10th Cir. 1972), stating:

Before a Federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. 461 F.2d at 265.

In the case at bar, appellant was denied a trial by an impartial jury and the errors pertaining thereto must be presumed to be prejudicial.

CONCLUSION

The compelling weight of authority favors a severance in circumstances such as those in the case at bar. A common theme throughout the cases cited is the prejudicial effect on a jury of one defendant claiming the right to testify.

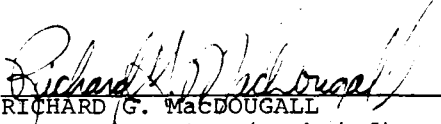
In the case at bar, no amount of admonishing the jury could purge the prejudicial effect upon appellant of the statements and conduct of counsel for Morishita. In fact, further admonitions to the jury might only have exacerbated the problem.

If the requirement of Section 77-44-5, Utah Code Annoated, (1953), that a defendant's refusal to testify "shall not in any manner prejudice him or be used against him," is to be given meaning, then appellant's motion for a new trial should have been granted and appellant is entitled to a reversal.

DATED this 12th day of September, 1978.

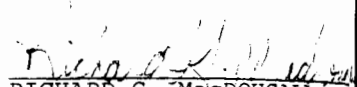
Respectfully submitted,

STEPHEN R. McCAUGHEY
Attorney for Appellant
72 East Fourth South, #330
Salt Lake City, Utah 84111


RICHARD G. MACDOUGALL
Attorney at Law (on brief)
321 South Sixth East
Salt Lake City, Utah 84102

CERTIFICATE OF DELIVERY

I hereby certify that I delivered two copies of the foregoing Brief of Appellant to the Attorney General's Office, at 236 State Capitol, Salt Lake City, Utah this 13th day of September, 1978.


RICHARD G. MacDOUGALL
Attorney at Law
321 South Sixth East
Salt Lake City, Utah 84102