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State of Utah v. Joe Petralia : Brief of Respondent

Utah Supreme Court

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Clinton D. Vernon; Quentin L. R. Alston; Attorneys for Respondent;

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOE PETRALIA,
Defendant and Appellant.

Case No. 7406

RESPONDENT'S BRIEF

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CLINTON D. VERNON,
Attorney General

QUENTIN L. R. ALSTON
Assistant Attorney General

ATTORNEYS FOR RESPONDENT

Clerk, Supreme Court, Utah

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In the Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JOE PETRALIA,
Defendant and Appellant.

} Case No. 7406

RESPONDENT'S BRIEF

STATEMENT OF FACTS

This is an appeal by the defendant, Joe Petralia, from the verdict of the jury finding him guilty of the crime of Grand Larceny, and the sentence of the court thereon.

The brief of appellant contains a summary of the facts which were presented to the court and jury upon which the

defendant was convicted and duly sentenced. Although appellant's brief presents the facts in a manner to best serve the arguments of appellant in his Statement of Errors, it is felt that a recapitulation here would serve no useful purpose. Respondent will therefore refrain from making an independent presentation of the facts at this time but will do so where necessary in order to portray a version which may be at variance with that of the appellant.

STATEMENT OF POINTS

I. The court did not err in denying defendant's motion for a new trial.

II. The defendant was not prejudiced by the contempt proceedings.

III. The court did not unreasonably restrict the voir dire examination of the prospective jurors to the prejudice of the defendant.

IV. The court did not err in admitting in evidence the testimony of Wayne Smith and various State's exhibits.

V. The court did not commit prejudicial error in instructing the jury.

VI. The court did not err in refusing to give to the jury defendant's requested instruction No. 1.

VII. The court did not err in refusing to give to the jury defendant's requested instruction No. 5.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR A NEW TRIAL.

This Honorable Court has on numerous occasions held that the granting or refusing of a motion for a new trial rests exclusively in the sound discretion of the trial court and that the exercise of that discretion will not be disturbed unless it appears that it has been abused to the prejudice of the defendant. *State v. Weaver*, 78 Utah 555, 6 P. (2d) 167; *State v. Mellor*, 73 Utah 104, 272 P. 635; *State v. Montgomery*, 37 Utah 515, 109 P. 815.

An examination of the record in this case will reveal that grounds 1, 2, 3, 4, and 10 set forth in appellant's Motion for New Trial were not supported by affidavits as required by the provisions of Section 105-39-4, Utah Code Annotated 1943, and therefore may not now be considered. It is respectfully submitted that the record does not reveal that the trial court abused its discretion to the prejudice of the defendant in denying appellant's motion for a new trial.

POINT II.

THE DEFENDANT WAS NOT PREJUDICED BY THE CONTEMPT PROCEEDINGS.

Appellant contends that the court committed prejudicial error in imposing and levying a fine upon the defendant for

contempt of court (Br. 26). Without assuming one way or the other whether the court exceeded its jurisdiction in imposing a contempt fine of \$208.00 or whether His Honor acted capriciously and arbitrarily in finding the defendant in contempt of court and in requiring him to pay a fine of \$208.00 to purge himself, respondent respectfully submits that the record shows that the defendant was not prejudiced by this action. It will be noted that no jurors were present in the court room during the contempt proceedings (Br. 4), and appellant fails to point out where any rulings or orders during the course of the trial appear to have been influenced by any claimed bias or prejudice of His Honor as a result of the contempt proceedings.

POINT III.

THE COURT DID NOT UNREASONABLY RESTRICT THE VOIR DIRE EXAMINATION OF THE PROSPECTIVE JURORS TO THE PREJUDICE OF THE DEFENDANT.

Appellant contends that the defendant was prejudiced by the manner in which he claims the court unduly and arbitrarily restricted the examination of the prospective jurors upon voir dire (Br. 29). The purpose of the voir dire examination is to secure for the defendant an impartial and disinterested jury, and he must therefore be given a reasonable opportunity to obtain such a jury. It is always essential, however, that the examination be conducted in good faith and, so that prejudice will not be engendered, it is within the exercise of the wise

discretion of the court to safeguard the course of the questioning. *Balle v. Smith*, 81 Utah 179, 17 P. (2d) 224. An examination of the transcript will reveal that defendant's counsel questioned fourteen of the sixteen prospective jurors called to the jury box at great length in selecting the jury which would try the case (Tr. 4-15). This was so even though the court did indicate that it might limit counsel's questions (Tr. 5). As a matter of fact, the only admonition given by the court in the course of counsel's examination was that his examination be limited to interrogating rather than lecturing the jury (Tr. 6), and, that the examination of Mr. Jensen was repetitious on the question of the guilt or innocence of the defendant (Tr. 7). In answer to counsel's prior questions, Mr. Jensen had already stated that he had formed no opinion concerning the guilt or innocence of the defendant (Tr. 6).

It may be interesting to note here that not only did the court not prevent or even suggest that the examination of the prospective jurors be discontinued but there was no attempt made by counsel for appellant to challenge any of the prospective jurors for cause. Furthermore, the record shows that Mr. Jensen, the prospective juror whom counsel for appellant cites as an example where the voir dire examination was claimed to have been unduly and arbitrarily restricted, was not one of the jurors who tried the case.

It is respectfully submitted that the record fails to support the contention that the voir dire examination of the jurors was unduly and arbitrarily restricted to the prejudice of the defendant.

POINT IV.

THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE THE TESTIMONY OF WAYNE SMITH AND VARIOUS STATE'S EXHIBITS.

It is contended that the court committed error in admitting in evidence State's Exhibits "B," "C," "E," "F," "G," "H," "I," "J," "K," and "M" and the testimony of Wayne Smith. the only objection to such exhibits and the disputed testimony both at the time of introduction and as argued in appellant's brief was that the same were "incompetent, irrelevant and immaterial."

With reference to the stock objection that the evidence or testimony is "incompetent, irrelevant and immaterial," it was said in *Hungate v. Hudson*, 353 Mo. 944, 185 SW (2d) 646, 157 A.L.R. 598, that:

" * * * as a rule, the general objections of irrelevancy and immateriality call for no more action on the part of the court than the assigned objections imply,—if more is expected or required of the court or there are other reasons the cross-examination is improper or the evidence is inadmissible specific objections must be made for those reasons."

In the course of its opinion the Missouri court went on further to hold, in substance, that the admission in evidence of facts entirely immaterial to the issues and without probative force is not reversible error, especially when the facts evidenced are of such a character that they do not have a natural tendency to inflame or arouse hostile passions and their prejudicial

effect is not otherwise made to appear.

Assuming, merely for purpose of argument, that part or all of the exhibits and the testimony referred to were "incompetent, irrelevant and immaterial," counsel for appellant does not claim that prejudicial error was committed by the court. In referring to the disputed exhibits and testimony, counsel's only argument concerning their inadmissibility is as follows: (Br. 35)

"None of this was ever brought home to Petralia, and all was mere 'dressing,' and attempts to prove in advance that which was not contradicted.

"Manifestly irrelevant and incompetent."

Dealing generally with the admission of improper evidence, it is said in 5 C. J. S. 1009, Sec. 1732:

"It is a well-settled general rule that it is harmless error for the court, in the conduct of the trial, to permit the introduction of irrelevant, incompetent, or other improper evidence relating to a fact which is admitted, conceded, uncontroverted, or which has been placed beyond the realm of dispute by uncontradicted evidence which has been adduced, or by agreement or stipulation of the parties; since, under the circumstances, the evidence could not mislead the jury."

The rule generally recognized by the authorities is that announced by the Supreme Court of the State of Oklahoma in *L. O. & H. L. Street v. Arnold*, 40 P. (2d) 1050, 170 Okla. 389, wherein it was said:

"One who complains that the trial court erred in admitting evidence, over his objections, must be able

to show wherein said evidence was detrimental to his cause."

In this case, aside from the fact that counsel for appellant complains that the disputed evidence and testimony was "incompetent, irrelevant and immaterial," there is no showing whatsoever that it was prejudicial or of such a character as to have a tendency to inflame or arouse the hostile passions of the jury. On the contrary, it is submitted that a careful reading of the transcript will show the competency, relevancy and materiality of the disputed evidence and, that in any event, no harmful error was committed in its admission.

POINT V

THE COURT DID NOT COMMIT PREJUDICIAL ERROR IN INSTRUCTING THE JURY.

It is strenuously urged by counsel for appellant that the court committed prejudicial and reversible error in using the phrase "from the immediate presence" rather than "from the person" in instructing the jury concerning the crime of Grand Larceny in Instructions No. 5, 6, 7, 8 and 11. It is true, as appellant contends, that in instructing the jury the court did state that Grand Larceny is committed when the property is taken "from the immediate presence" rather than "from the person" of another, as set forth in subsection 2 of Section 103-36-4, Utah Code Annotated 1943. Courts have held, however, that the phrase "from the person" is substitutionary or tantamount in meaning to the phrase "from the immediate presence." *Mahoney v. State*, 180 NE 580; *Porello*

v. State, 121 Ohio St. 280, 168 NE 135; State v. Lamb, 242 Mo. 398, 146 SW 1169; People v. Kubish, 357 Ill. 531, 192 NE 543; State v. Craft, 299 Mo. 332, 253 SW 224; O'Donnell v. People, 224 Ill. 218, 79 NE 639; and Jackson v. State, 114 Ga. 826, 40 SE 1001.

Furthermore, the Supreme Court of the State of Utah in State v. O'Day, 93 Utah 387, 73 P. (2d) 965, stated:

"We have read the transcript carefully, and, if any property was taken, it was taken *from the person or immediate presence* of complaining witness, so it could not be less than grand larceny or robbery."

Counsel for appellant admits that there was evidence that property was taken from the "immediate presence" of Steve and Anazawa (Br. 39). In view of the judicial construction which has been placed on the phrase "from the person," it cannot be argued successfully that prejudicial error was committed by the court in instructing the jury as it did concerning the crime of Grand Larceny.

It is urged also that the court committed prejudicial error in giving Instruction No. 9 in that it unduly commented upon the evidence and assumed as a fact that Steve and Anazawa were robbed. Counsel argues that "the instruction, as given, was calculated to carry the thought to the jury that the judge in the case thought the defendant guilty," and concludes that, "the form of this instruction ought not to be approved, although it may not be sufficient standing alone to justify a new trial (Br. 41). Whatever inferences may be drawn from the language in Instruction No. 9, that instruction must be

construed in harmony with and considered in the light of all the other instructions which were given. Any inferences, whether reasonable or unreasonable, which could be drawn from the language of that instruction to the effect that the judge thought a robbery had been committed or that the defendant was guilty, were certainly negatived by His Honor in instructing the jury in Instruction No. 27 as follows:

"The court does not express any opinion of any of the facts in the case, and it is immaterial what the views of the court thereon may be. Neither by these instructions nor by any words uttered or remarks made during the trial does the court intimate or mean or wish to be understood as giving an opinion as to what the proof is or what it is not, or what the facts are or what are not the facts in this case."

The instructions pointed out specifically that the burden was on the state to prove every material allegation in the information beyond a reasonable doubt; that the defendant was not required to prove his defense of alibi beyond a reasonable doubt but should be acquitted if the evidenced raised a reasonable doubt as to his presence at the time and place of the commission of the crime; that a conviction could not be had upon the uncorroborated testimony of accomplices; and, that the defendant was presumed to be innocent until proved guilty beyond a reasonable doubt. It is respectfully submitted that with these and the other precautionary instructions which were given and more particularly with the admonition of the court in Instruction No. 27 that, "Neither by these instructions nor by any words uttered or remarks made during the trial does the court intimate or mean or wish to be understood

as to what the proof is or what it is not, or what the facts are or what are not the facts," the court did not err in giving Instruction No. 9.

POINT VI.

THE COURT DID NOT ERR IN REFUSING TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 1.

Defendant's requested Instruction No. 1 was as follows:

"You are instructed to return a verdict of 'not guilty' in favor of the defendant and to so say by your verdict."

In connection with this requested instruction, it is argued that the evidence in the case did not corroborate the testimony of he witness, Salerno, and that it was the duty of the court to determine as a matter of law whether or not there was sufficient evidence to corroborate his testimony. Section 105-32-18, Utah Code Annotated 1943, does prohibit a finding of guilty upon the uncorroborated testimony of an accomplice. It reads:

"A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof."

The general rule with reference to whether or not there is a legal sufficiency of evidence to warrant its submission to the jury is set forth in 23 C. J. S. 651, Sec. 1139, as follows:

“Whether there is a legal sufficiency of evidence in support of the material issues of the case which will warrant its submission to the jury is a question of law for the court, in determining which it is only necessary that there should be so much proof as to make it proper to submit the evidence to the jury, and not that the court should be satisfied beyond a reasonable doubt. Evidence of motive alone is not sufficient to take the case to the jury. Where, however, there is any evidence, however slight, on which the jury may justifiably find the existence or the nonexistence of material facts in issue, and the evidence is conflicting, or of such a character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury for determination, even though the court does not believe the evidence, or is of the opinion that it is not sufficient to convict, or is doubtful whether the evidence presented will be convincing to the jury. In such a case, it is error for the court to take the issue from the jury by dismissal or nonsuit, or by the direction of a verdict, or by excluding the evidence from the jury.”

In commenting upon the corroborative evidence in the record, counsel for appellant admits that there is some evidence but goes on to say, “when all is said and done, it is largely a matter of impression with the reviewing court, whether or not the case should have been taken from the jury.” Thus, by his own admission, it would have been error for the court to have withdrawn the case from the jury even though the evidence of corroboration may have been slight and even though the court may not have believed the evidence.

A perusal of the record shows that the evidence amply supports and corroborates the testimony of Tony Salerno. The testimony of George Pappas shows that on or about July

12, 1948, Joe Petralia called him by telephone and told him that he wanted to give the money back if there was a way (Tr. 45-6). Also, during the course of a conversation in Bell, California, on July 15, 1948, that Joe Petralia told him the boys only got about \$17,600 and that in the get-away they lost between \$400-\$500 silver dollars (Tr. 47-8). Later, when George Pappas asked Joe Petralia about a gun of his which he claimed the boys had taken, Joe replied that one of the boys had thrown it out of the car on the right side on the highway where the viaduct is located (Tr. 49). Furthermore, during that visit, Joe Petralia made arrangements to return \$6,000.00 to George Pappas in a shoe box (Tr. 50). The record shows, too, that as Joe Petralia was taking George Pappas to the station to return to Ogden, Utah, he did give George Pappas a package (Tr. 53). Such testimony certainly corroborated the testimony of Tony Salerno in associating and implicating the defendant, Joe Petralia, in the offense for which he was finally convicted. These actions, if the testimony can be believed, do not evidence anything other than the fact that Joe Petralia did participate in and was guilty of the offense for which he was convicted.

The testimony of Harry Pappas substantiated the testimony of George Pappas that his brother George did receive a package from Joe Petralia containing \$6,000.00. This, too, it is submitted, corroborates the testimony of Tony Salerno (Tr. 85-6).

The testimony of Fae Shelby Rugg shows that Joe Petralia called upon Tony Salerno at an auto court at Bell, California, in the spring of 1948 (Tr. 242-3-4). That during

the course of the conversation they (Joe Petralia and Tony Salerno) talked about money and insurance (Tr. 245), and that it wouldn't cost Harry and George anything because they were heavily insured (Tr. 245). Not only was she a witness to that conversation, but she herself had a conversation with Joe Petralia following the robbery, at which time she told him that he'd been very clever in all his maneuvers except in not seeing Tony Salerno (Tr. 248). Can it be said that this, along with all the other evidence in the record, does not implicate the defendant Joe Petralia and corroborate the testimony of Tony Salerno?

Finally, the testimony of the policeman, Henry Allred, was to the effect he had known Joe Petralia for approximately fifteen years prior to the robbery of the Club and that he had seen Joe near the door of the Alexander Cafe on 25th and Lincoln Streets in Ogden, Utah, on June 24, 1948, the night before the robbery (Tr. 251).

It is respectfully submitted that to deny that the above and the other evidence in the record corroborates the testimony of Tony Salerno in implicating him with the offense for which he was convicted, is to refuse to admit the obvious.

POINT VII

THE COURT DID NOT ERR IN REFUSING TO GIVE TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 5.

Counsel for appellant argues that the court committed

prejudicial error in refusing to give defendant's requested Instruction No. 5 which attempted to submit to the jury the question of whether a robbery was in fact committed or whether the whole thing was a "frame-up" or "phoney." Counsel urges that the jury should have been given an opportunity to consider the "realities."

In answering this argument it is submitted that a review of the record will establish without question that of necessity the jury must have been convinced beyond a reasonable doubt that the defendant, Joe Petralia, was guilty of the offense for which he was convicted and that the offense was in truth and in fact actually committed. Rather than being a matter of submitting the question of the realities to the jury, it appears that counsel for appellant would have the jury, His Honor at the trial below and the members of This Honorable Court close their eyes to all reality.

CONCLUSION

A review of the entire record and the law in relation thereto reveals that the defendant, Joe Petralia, was afforded a fair trial in accordance with established legal principles and that the proceedings were free from prejudicial error. It is therefore respectfully submitted that the verdict of the jury finding him guilty of the crime of Grand Larceny and

the judgment of the court thereon should be affirmed by this Honorable Court.

Respectfully submitted,

CLINTON D. VERNON

Attorney General

QUENTIN L. R. ALSTON

Assistant Attorney General

Attorneys for Respondent