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State of Utah v. Mark Anthony Collins : Brief of Appellant

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

v.

MARK ANTHONY COLLINS,
Defendant-Appellant,

CASE NO. 15812

APPELLANT'S BRIEF

Appeal from the Judgment of the
District Court of Utah County
HONORABLE J. ROBERT BULLOCK, JUDGE

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
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Plaintiff-Respondent,)
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vs.)
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MARK ANTHONY COLLINS,)
)
Defendant-Appellant.)

CASE NO. 15812

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a criminal case wherein the defendant, Mark Anthony Collins, was charged in the Fourth Judicial District Court of Utah County, State of Utah, upon two criminal counts alleging violations of Section 76-5-402 and Section 76-5-403, Utah Code Annotated. The Information alleged that Mark Collins had sexual intercourse with a female, not his wife, without the consent of said female and that he also engaged in a sexual act involving the genitals of said female and the mouth of the defendant without the consent of said female.

DISPOSITION IN THE LOWER COURT

The matter was tried in the Fourth Judicial District Court in and for Utah County, State of Utah, Honorable J. Robert Bullock, Judge presiding.

The defendant was convicted on both counts and sentenced to serve not less than one (1) year nor more than fifteen (15) years in the Utah State Prison on each count, with the sentences to run concurrently.

It is from that verdict and judgment that the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of his conviction or failing that, a new trial.

STATEMENT OF THE FACTS

A complaint was filed in the Orem City Court alleging seven (7) counts of criminal violations against three (3) individuals; John Hyrum Laursen, Mark Anthony Collins, the the defendant herein, and Henry Carl Smith.

Count I through Count IV alleged violations of Section 76-5-402 and 76-5-403 against John Hyrum Laursen.

Count VII alleged another violation of Section 76-5-403 against John Hyrum Laursen.

Count VI alleged a criminal violation of Section 76-5-403 against Henry Carl Smith.

Count IV and Count V alleged criminal violation against Mark Anthony Collins.

The allegations in Count IV and Count V against the defendant herein, are separate from and involve a different victim than the counts alleged against Mr. Laursen and Mr. Smith.

The Information was filed in the Fourth Judicial District Court of the State of Utah alleging the same seven (7) counts of criminal violations against the three (3) separate defendants. Defense Attorney for Mr. Collins filed a Motion to Quash on the basis that Mr. Collins was improperly joined as a co-defendant with Mr. Smith and Mr. Laursen. It is noted that the allegations against Mr. Collins involved a separate victim, Stephanie Hunter, than the allegations against Mr. Laursen and Mr. Smith, involving Susan Soverine. Upon the basis of the Information, the only apparent connection between the allegations against Mr. Collins and the allegations against Mr. Smith and Mr. Laursen is that they occurred on the same day and that they are sexual acts.

The evidence in the case indicated that the two girls, Stephanie Hunter and Susan Soverine, resided in South Salt Lake County and that they had rode a bus from South Salt Lake to

2700 South in Salt Lake. They were in the process of returning to their homes by means of hitch-hiking, when a car pulled up with three male individuals inside. The girls got in voluntarily and rode with the defendants. The two girls initially got into the back seat but later Mark Collins and Susan Soverine exchanged places, with Mark in the back seat and Susan Soverine in the front.

Much of the testimony from this time forward is disputed by the defendants and the victims. However, they did travel from Salt Lake County into Utah County and stopped at an isolated area in the Northern part of Utah County. Mr. Smith was seated on the passenger side in the front seat and Mr. Laursen was in the driver's position, with Susan Soverine in the middle.

Stephanie Hunter and Mr. Collins, the appellant herein, were in the back seat.

The accusations are that Mr. Smith performed sexual acts upon the genitals of Susan Soverine and that Mr. Laursen was an accomplice in that act and that he, Mr. Laursen, further assaulted Susan Soverine through three (3) different sexual acts.

The accusations against Mr. Collins are that Mr. Collins performed a sexual act upon the genitals of Stephanie Hunter and that he had sexual intercourse with Stephanie Hunter. There are no allegations or accusations that Mr. Collins was an accomplice.

lice to Mr. Laursen's or Mr. Smith's acts, nor that Mr. Laursen or Mr. Smith had any involvement with Mr. Collins.

After stopping in the hills above Alpine, some alleged threats were made by Defendant Laursen. The State's evidence indicated that Mr. Laursen committed three (3) sexual acts upon Susan Soverine, while in another instance being an accomplice to Henry Carl Smith's sexual acts to the same girl.

Mr. Collins, the Appellant herein, was in the back seat and the State's evidence against Mr. Collins is the testimony of the alleged victim, Stephanie Hunter.

Both Mr. Collins and Ms. Hunter testified to an act of sexual intercourse and to an act of cunnilingus. The evidence differed as to whether the acts were consensual.

Defendant attempted to introduce evidence of two (2) polygraph examinations to support his testimony, both tests administered by different licensed polygraph examiners. Such evidence, after argument about the legal admissibility, was excluded from the Jury's consideration as a matter of law.

The case was then submitted to the Jury without benefit of the polygraph examinations.

POINT I

THE TRIAL COURT IMPROPERLY EXCLUDED RESULTS OF A POLYGRAPH EXAMINATION TO THE PREJUDICE OF THE DEFENDANT.

The Supreme Court of Wyoming in State v. Cullins,
(Wyo. 1977) 565 P.2d 445 stated:

"Science has made great strides toward the goal of determining the truth in judicial proceedings. Sophisticated techniques have been developed in firearms identification through ballistics; identity of assailants through blood analysis; degree of alcoholic intoxication through chemistry and electronics, to mention some. One of the most extraordinary contrivances is the instrument known as the polygraph or lie detector. It measures pulse rate, blood pressure, respiration and electrodermal responses. Physiological changes occur, ostensibly caused by fear and uneasiness induced by the act of lying. Reid and Ibban, Truth and Deception, pp. 1-5.

Broadly speaking, courts in the past have ruled that an opinion and supporting data of the polygraph examiner are inadmissible in evidence when offered by either party, either as substantive evidence or relating to credibility of a witness. McCormick on Evidence, 2d Ed. Section 207, pp. 504-507; 3 Wharton's Criminal Evidence, Torcia 13 Ed. Section 630, pp. 249-253.

The admissibility of polygraph examinations has been a controversial subject in the past but courts are beginning to recognize the value of such evidence in the ascertainment of truth.

In State v. Dorsey, 88 N.W. 184, 539 P. 2d 204, the New Mexico Supreme Court reversed a murder conviction in that the trial court excluded a proffered polygraph examination from evidence.

In People v. Cutler, No. A176965 (Super. Ct. Los Angeles County, Cal. Nov. 6, 1972), 12 Criminal Law Reporter 2133 (1972) the Court recognized:

"(T)he science of polygraph including the developing of more sophisticated polygraph machines; the development of standards of procedures in pre-examination interviews; the elimination of unsuitable subjects; the programming of relative and control questions; the training and developing of qualifications for examiners has been the subject of great and significant advancement in the last ten years.

...(R)ecent laboratory and in the field research has established a generally recognized reliability and validity of the polygraph in excess of 90 percent.

...(T)he polygraph now enjoys general acceptance among authorities...and possesses a high degree of reliability and validity as an effective instrument and procedure for detecting deception.

...(M)any defense and security agents of the United States Government determine whether charges and court martials will be filed or prosecuted on the basis of polygraph examinations.

...(S)everal law enforcement agencies in California uniformly refuse to file complaints or informations when no deception is shown in polygraph examinations of suspects...."

In United States v. Zieger, 350 F. Supp. 685 (D.D.C.),
Rev'd per Curiam, 475 F. 2d 1280 (D.C. Cir. 1972), the Court
found:

"(t)oday, polygraphy has emerged from that twilight zone into an established field of science and technology...Its extensive use by law enforcement agencies, governmental security organizations, and private industry throughout the country is testimony to the undeniable efficacy of the technique.

...The testimony of the experts and the studies appearing in the exhibits lead the Court to believe that the polygraph is an effective instrument for detecting deception. The failure of the Government to demonstrate significant disagreement with this basic proposition, the absence of statistical data pointing to any other conclusions, and the accepted and widespread absorption of the polygraph into the operations of many governmental agencies, all confirm the Court's conclusion that the

polygraph has been accepted by authorities in the field as being capable of producing highly probative evidence in a court of law when properly used by competent, experienced examiners."

In United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972), the Court held that polygraph evidence would be admissible in a perjury trial and recognized the reliability of polygraph techniques by stating:

"The evidence in this case indicates that the techniques of the examination and the machines used are constantly improving and have improved markedly in the past ten years."

In Cullen v. State (Sup. Ct. Wyo. 1977), 565 P. 2d 445 the Court noted that the polygraph examination has and is gathering acceptance, citing "Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System", 26 Hastings Law Journal 921; "The Emergence of the Polygraph at Trial", 73 Columbia Law Review 1120; and "Hypnosis, Truth Drugs, and the Polygraph: An Analysis of Their Use and Acceptance by the Courts", 21 University of Florida Law Review.

The Court went on to cite State v. Dorsey, 88 N.M. 184, 539 P. 2d 204 (1975) and found the evidence admissible when the parties had stipulated to its admission prior to trial but concluded:

"However, we do not base admissibility of polygraph results solely upon the basis of the stipulation. There should be some test of reasonable reliability before final admission

by the judge, even though the parties agree. We see no real or unusual problem in that regard and believe that it can be accomplished through existing, accepted rules of evidence."

The Wyoming Court stressed the rationale of State v. Dorsey, (supra) that relevant evidence, having a tendency to make a fact of consequence more probable or less probable, should be admissible.

The New Mexico Court looked to the purpose and construction of the New Mexico Rules of Evidence that:

"These rules shall be construed to secure fairness in administration...and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined...." New Mexico Rules of Evidence (Sections 20-4-101 to 1102, N.M. S.A. 1953 Repl. Vol. 4, Supp 1973)

The Court found inadmissibility particularly incompatible with the purpose and scope of Rules 401, 402, 702 and 703 of the New Mexico Rules of Evidence.

Rule 401 and 402 reads:

"20-4-401. Rule 401-Definition of "Relevant Evidence".

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

20-4-402. Rule 402-Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules, or by other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible."

Rule 702 and 703 reads as follows:

"20-4-702- Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

20-4-703- Rule 703-Bases of Opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

The Court of Appeals of New Mexico in State v. Dorsey, (supra) found when the polygraph evidence was excluded, it denied the defendant due process; the right to a fair opportunity to defend against the State's accusation by the presentation of relevant evidence.

Considerable studies have been completed judging the reliability of polygraph examinations. Dr. David C. Raskin, PH.D., University of Utah, and Dr. Gordon H. Barland made an extensive study for the Department of Justice and concluded that such tests are approximately 90 percent (90%) accurate when properly conducted and evaluated. Raskin and Barland, Validity and Reliability of Detection of Deception; National Institute of Law Enforcement and Criminal Justice, Law Enforcement

ment Assistance Administration, U.S. Department of Justice,
Contract 75-NI-99-0001 (1976).

In United States v. DeBetham, 348 F. Supp 1377 (S.D. Cal.), aff'd, 470 F. 2d 1367 (9th Cir. 1972), cert. denied, 412 U.S. 90 (1973), the Court recognized the following:

"...the field of instrumental lie detection has...achieved the status of a department of systematized knowledge that is currently being enriched through further investigation and research."

The Court went on to observe that the polygraph test had a high degree of accuracy when conducted by competent examiners under proper conditions, and that the estimated accuracy was approximately ninety percent (90%) with less than one percent (1%) error by experts who based their statistics upon actual examinations in the field. See also United States v. Zeiger, (supra).

In a previous study, Dr. Raskin and Dr. Barland administered tests regarding the accuracy of the polygraph test and concluded the test's reliability to be eighty-six percent (86%). Barland and Raskin, An Evaluation of Field Techniques in Detection of Deception, in Psychophysiology (1975).

A number of published studies have reported accuracy of field polygraph examinations in excess of ninety-two percent (92%). Kubis, Experimental and Statistical Factors in the Diagnosis of Consciously Suppressed Affective Experience, 6 J.

Clinical Psych. 12, 14 (1950); Mac Nitt, In Defense of the Electrodermal Response and Cardiac Amplitude as Measures of Deception, 33 J. Crim. L.D. & P.S. 266, 271 (1942); Summers, Science Can Get the Confession, 8 Fordham L. Rev. 334-340 (1939).

A recent article discussed an extensive and thorough study conducted under the supervision of Robert Brisentine for the Department of Defense. A panel of experienced military criminal lawyers were given the complete file on each case, with the polygraph results removed. Each attorney independently determined the guilt or innocence of each defendant based upon the available evidence. When all four panel members were in agreement as to guilt or innocence of a defendant, the decision of the polygraph examiner was the same as that of the panel in 92.4% of the cases. Bersh, A Validation Study of Polygraph Examiner Judgments, 53 J. Applied Psych. 399 (1969). These results reported have been confirmed in Gordon Barland's doctoral research. G. Barland, Defendant of Criminal Suspects, 1975 (unpublished doctoral dissertation in University of Utah Library).

Consequently, the polygraph examination has been proven to be, at the least, reliable in excess of eighty-five percent (85%) of the time.

Adopting the New Mexico Supreme Court's rationale, State v. Dorsey, (supra), the evidence ought to be admitted,

in that, the evidence has the tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence.

This Court has defined relevant evidence as "evidence having any tendency in reason to prove or disprove the existence of any material fact". Rule 1(2), Utah Rules of Evidence.

The nature of the crime charged and the specific issue of consent being involved, brings forth a situation where the credibility of the defendant and alleged victim is the crucial determination of guilt or innocence. In the present case, the act of sexual intercourse is testified to by both sides, State and Defense. The Jury was left to decide whether the act is consensual. Either the alleged victim is to be believed or the young defendant, Mark Anthony Collins.

The polygraph evidence is offered to support and corroborate the testimony of the young man, Mr. Collins. With the evidence's reliability being approximately ninety percent (90%), the evidence is highly probative.

The evidence is relevant and should not have been excluded, in that, it has a tendency to prove the existence of a material fact, that of consent or lack of it. Utah Rules of Evidence, Rule 1(2).

POINT II.

THE DEFENDANT-APPELLANT WAS IMPROPERLY JOINED WITH THE CO-DEFENDANTS, JOHN HYRUM LAURSEN AND HENRY CARL SMITH IN THE INFORMATION.

Defendant moved the trial court to quash the information as it improperly joined Appellant with the other defendants Laursen and Smith. Such Motion was denied.

Defendant Collins was joined in the same information with John Hyrum Laursen and Henry Carl Smith, although there was no relationship between the defendant Collins and the co-defendants in the same crime or even the same victim.

The Code of Criminal Procedure in the "Rules of Pleadings" controls such joinder of parties. Utah Code Annotated, Section 77-21-31(2) reads:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." (Emphasis added)

Consequently, unless Defendant Collins' participated in the same act or transaction or the same series of acts or transactions constituting the offense or offenses against Defendant Smith and Defendant Laursen, he, Defendant Collins, may not be joined in the same information with the other defendants.

Defendant's Motion to Quash the Information should have

been granted.


CONCLUSION

The Appellant in the case at bar, was prejudiced in his right to a fair trial by the exclusion of relevant evidence - a polygraph examination.

The Appellant-Defendant was also prejudiced by the denial of his Motion to Quash. The charges against Appellant herein, should not have been joined with co-defendant's John Hyrum Laursen and Henry Carl Smith, and the Appellant herein respectfully requests a reversal of his conviction, or failing that, a new trial.

DATED this 6th day of October, 1978.

RESPECTFULLY SUBMITTED:


SHELDON R CARTER
Attorney for Appellant