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State of Utah v. Ernie Gates : Brief of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
State of Utah

STATE OF UTAH

vs.

ERNIE GATES

Defendant and Appellant.

No. 7474

APPELLANT'S BRIEF

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and

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FILED

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IN THE
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Defendant and Appellant.

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APPELLANT'S BRIEF

STATEMENT OF FACTS

The Appellant was charged with the crime of pandering, by the following information:

(Title of Court and Cause)

Ernie Gates having heretofore been duly committed by J. Quill Nebeker, a committing magistrate of this county to this court, to answer this charge, is accused by the District Attorney of this Judicial District, by this information, of the crime of Pandering, a felony, committed as follows, to wit:

Ernie Gates induced, persuaded, encouraged, in-

veigled and enticed a female person, Beverly Willis, to become a prostitute.

GLENN W. ADAMS

District Attorney, Second Judicial District

The names of the witnesses testifying on the part of the state, in the examination held before the Committing Magistrate were endorsed thereon. (Tr. 2.)

Trial on November 30, 1949, resulted in conviction (Tr. 56.) whereupon defendant on the 5th day of December, 1949, was sentenced to serve not less than twenty years in the State Penitentiary of the State of Utah.

From that conviction and judgment this appeal is taken.

ASSIGNMENT OF ERRORS

Comes now the defendant Ernie Gates and assigns the following errors upon which he relies for a reversal of the verdict of the jury and judgment entered thereon on December 5th, 1949.

Assignment of Error No. 1.

The court erred in giving instruction No. 1, (Tr. 52.) which is as follows:

“In this case the court instructs you that the defendant has been charged by the information that he persuaded and encouraged and inveigled Beverly Willis to become a prostitute. At the—this was about September 29, 1949. At the time there was on the statute books of the State of Utah a law which made it a felony to try to induce or entice or encourage a female to become a prostitute.”

Assignment of Error No. 2.

Defendant assigns error to the general remarks of the court in the presence and hearing of the jury as to whether or not the testimony of Ernest Ketchum relative to Beverly Willis being a chaste and virtuous woman was material. (Tr. 50-51.)

Assignment of Error No. 3.

The court erred in denying defendant's motion for a dismissal on the grounds that the state presented insufficient evidence to make out the crime of pandering in the State of Utah. (Tr. 35.)

Assignment of Error No. 4.

Defendant assigns error to the general remarks of the court in the presence and hearing of the jury as to the fact that Albert Gentile had corroborated the testimony of the states witnesses. (Tr. 45.)

Assignment of Error No. 5.

The court erred in giving the instructions to the jury for the reason and on the ground that the same do not contain a complete statement of the law and matters upon which the jury must, of necessity, have been instructed in the case and upon the evidence as received by the court and permitted to go to the jury. (Tr. 52-56.)

Assignment of Error No. 6.

The court erred in denying defendant's motion for a new trial.

Assignment of Error No. 7.

The court erred in sentencing the defendant to serve

not less than twenty years in the Utah State Penitentiary, said sentence being contrary to the law of the State of Utah.

POINTS

1. THE COURT ERRED IN THE FOLLOWING INSTRUCTION TO THE JURY: "AT THE TIME THERE WAS ON THE STATUTE BOOKS OF THE STATE OF UTAH A LAW WHICH MADE IT A FELONY TO TRY TO INDUCE OR ENTICE OR ENCOURAGE A FEMALE TO BECOME A PROSTITUTE."

The court erred in giving its instruction as set forth in assignment No. 1 for the reason that the court misstated the law of the State of Utah in regards to pandering.

103-51-8, Utah Code Annotated, 1943, provides as follows: "Any person who procures a female inmate for a house of prostitution; or induces, persuades, encourages, inveigles or entices a female person to become a prostitute; etc."

The Utah Statute 103-51-8 does not provide that it is a felony "to try to induce or entice or encourage a female to become a prostitute."

2. Defendant assigns error to the general remarks of the court in the presence and hearing of the jury (Tr. 50-51.) which is as follows:

"First, I don't know why Mr. Browning let this in, but it's immaterial. Nothing has been shown that it's material."

These remarks were prejudicial error to defendant's rights in the case and tended materially to influence the

jury in its verdict of guilty in this action. Said remarks also invaded the province of the jury who are the exclusive judges of the facts, 104-24-14, Utah Code Annotated, 1943.

State v. Green, 33 Ut. 501-502

Keen v. Keen, (Ore.) 90 P. 147

3. Defendant assigns error to the overruling of his motion to dismiss on the grounds that the state presented insufficient evidence to make out the crime of pandering. (Tr. 35.)

At the close of the State's case, the defendant moved for a dismissal, which was denied, exception being taken thereto.

The refusal of the court to so rule was error for the reason that the state only presented evidence of responses by the defendant to questions asked by the prosecutrix. (Tr. 11-13). The state did not at any time introduce evidence to show that the defendant committed the crime of pandering in that the complaining witness by her own testimony (Tr. 24-25) showed that she was not a prostitute, nor did she commit any act of prostitution with the defendant or with anyone else because of the alleged inducements of the defendant, nor did she become a prostitute because of the defendant's solicitations and inducements. Section 103-51-8, Utah Code Annotated, 1943, provides as follows:

“Any person who procures a female inmate for a house of prostitution; or induces, persuades, encourages, inveigles or entices a female person to become a prostitute; etc.”

The question here is whether Mrs. Willis, the complain-

ing witness was encouraged, enveigled, or enticed to become a prostitute by the mere utterances of the defendant. The phrase "to become" indicates that there has been a change of condition; that a person who was not a prostitute, has become a prostitute because of the acts and solicitations of another person.

In order to make out the crime of pandering in the case at hand, it is necessary for the state to show that the complaining witness was not a prostitute on or about the 29th day of September, 1949, when the alleged criminal acts took place, but became a prostitute because of the encouragement and inducements of the defendant. By the complaining witness's own testimony, it is shown that there was no change of condition because of the alleged inducements.

In *People v. Cook* (Mich.) 96 Mich. 368, 55 N. W. 980 the court had under consideration the construction of the following statute, which is similar to the Utah Code Section 103-51-8:

"Every person who shall solicit or in any manner induce a female to enter such house for the purpose of becoming a prostitute shall be punished, etc."

In *People v. Cook*, the defendant's contention was to the effect that the word "becoming" implied a change of condition and did not merely mean for the purpose of engaging in prostitution, so that no conviction could thereunder be sustained on proof that the female so solicited to enter such house was at the time plying the trade of a prostitute. The contention was sustained for the reason that some force and effect should have been given to the word "becoming" especially since following portions of

the same act did not use the word and were apparently directed against such acts in relation to one already a prostitute.

In *State v. Topham*, (Utah) 59 Ut. 58, 123 P. 888, the complaining witness was already in a house of prostitution and the defendant by promises and inducements attempted to get the complaining witness to go to Ogden and enter a house of prostitution. In holding that the defendant's acts did not come within those made a felony by the statute, the court at page 896, held:

“It is not enough that the defendant made some kind of a promise to the inmate; it must also appear that the promise was made with the design or purpose of causing or inducing the inmate to remain in the alleged house of prostitution, and that it was one fairly calculated or naturally tending to produce such a result, and that the inmate in fact did so remain, not as evidence by a state of mind expressed on the witness stand, but as evidenced by some act or conduct on her part, or by something said or done by her, showing, or tending to show, that she acted on or was induced or influenced by the promise, and by reason thereof remained in the house of prostitution.”

It is evident from the holding in *State v. Topham* that the law in Utah is to the effect that mere solicitation without a change of condition is insufficient to make out the crime of pandering. In the case at hand if solicitation to become a prostitute is shown by the evidence that is all that can be found. There can be no question but that there was no change in the condition of the complaining witness due to the solicitations and inducements of the defendant and under the cases that have been cited, it is neces-

sary to show not only the solicitations and inducements, but also a change of condition brought about because of the solicitations and inducements.

State v. Topham, 59 Ut. 58, 123 P. 888

Jefferson v. State, (Okla.) 21 Cr. 388, 208 P. 1038.

State v. Mantis, (Id.) 32 Id. 724, 187 P. 268

People v. Cook (Mich.), 55 N. W. 980.

4. Defendant assigns error to the general remarks of the court in the presence and hearing of the jury as to the fact that Albert Gentile had corroborated the testimony of the state witnesses. (Tr. 45) which is as follows:

Mr. Browning: "My only purpose was to corroborate the same story that our folks told."

The Court: "He has already done that."

These remarks were prejudicial error to defendant's rights in the case and tended materially to influence the jury in its verdict of guilty in this action. Said remarks also invaded the province of the jury who are the exclusive judges of the facts.

104-24-14, Utah Code Annotated, 1943

State v. Green, 33 Ut. 501-502

5. Defendant assigns error to the court's instructions and to the whole thereof for the reason and on the ground that the same do not contain a complete statement of the law and matters upon which the jury must, of necessity, have been instructed in the case and upon the evidence as received by the court and permitted to go to the jury. (Tr. 52-56)

105-32-1, Utah Code Annotated, 1943

Everts v. Worrell, 58 U. 238, 197 P. 1043

Brannigan v. People, 3 U. 488, 498; 24 P. 767

6. The court erred in denying defendant's motion for a new trial based on the grounds that the facts proved do not constitute a public offense.

7. The court erred in sentencing the defendant to serve not less than twenty years in the Utah State Penitentiary, said sentence being contrary to the law of the State of Utah, Section 103-51-8, Utah Code Annotated, 1943, wherein it is stated that a person found guilty of pandering shall be punished by imprisonment in the state penitentiary for a term of not more than twenty years. The law provides for an indeterminate sentence, but the judgment of the court is that the defendant shall serve not less than the maximum period of twenty years. This was error in that the court fixed a definite term of imprisonment that was contrary to law.

Section 105-36-20, Utah Code Annotated, 1943

People v. Ferlin, 203 Cal. 587, 265 P. 230

People v. Rossi, 37 Cal. App. 778, 174 P. 916

Section 103-51-8, Utah Code Annotated, 1943

Lee Lim v. Davis, 75 U. 245, 284 P. 323

CONCLUSION

Appellant has undertaken to set forth all the material evidence, instructions, and all remarks of the court prejudicial to defendant's right herein, and the appellant respectfully requests this Honorable Court to set aside the verdict and judgment, and that the cause be reman-

ded for a new trial.

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GEORGE B. HANDY

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