

2001

Howard Smith Bennett v. Samuel W. Smith, warden, Utah state prison : Brief of Appellant

Utah Supreme Court

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Vernon B. Romney; Attorney General.

Larry R. Keller; Salt Lake Legal Defender Association; Attorney for Appellant.

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

HOWARD SMITH BENNETT
Petitioner-Appellant

-vs-

Case No. 14229

SAMUEL W. SMITH, Warden,
Utah State Prison
Respondent

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT
COURT OF THE THIRD JUDICIAL DISTRICT, IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE G. HAL TAYLOR PRESIDING.

LARRY R. KELLER
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VERNON B. ROMNEY
Attorney General

FILED

DEC 8 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HOWARD SMITH BENNETT
Petitioner -Appellant

-vs-

SAMUEL W. SMITH, Warden,
Utah State Prison
Respondent

:
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Case No. 14229
:
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:

BRIEF OF PETITIONER

STATEMENT OF THE NATURE OF THE CASE

The appellant, Howard Smith Bennett, appeals from an order of the Honorable G. Hal Taylor denying his Petition for Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

The appellant petitioned the Third District Court for a Writ of Habeas Corpus. The petition was dismissed by the Honorable G. Hal Taylor, Judge.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower Court's denial of his Petition

and asks that a Writ of Habeas Corpus issue from this Court releasing him from his illegal incarceration, or in the alternative, that this Court grant him a new trial on the case which resulted in his conviction for Second Degree Murder.

STATEMENT OF FACTS

Appellant Howard Smith Bennett is presently serving a sentence of ten years to life imposed by the Honorable Edward Sheya, Judge of the Seventh Judicial District for the State of Utah, upon his conviction by a jury of the crime of "Murder in the Second Degree"; such sentence being imposed on the 20th day of February, 1973.

Appellant appealed his conviction to this Honorable Court and his appeal was denied.

Appellant then filed his Petition for Writ of Habeas Corpus in Third District Court and retained Thomas Jones of Salt Lake City to represent him. After a lengthy argument off the record and out of the presence of the appellant, the Honorable G. Hal Taylor denied Appellant's petition and later denied his request to have argument on the record.

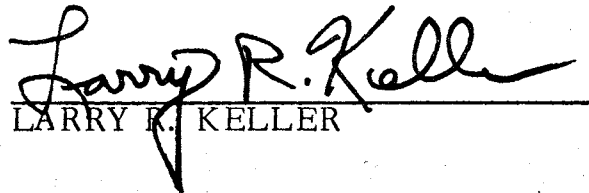
REQUEST FOR WITHDRAWAL OF COUNSEL

Counsel for Appellant was appointed to represent Appellant after the subject matter of this appeal was argued in the Third District Court by Thomas Jones, Appellant's paid attorney. It is present counsel's opinion that the issues argued are without merit, and I request permission to

withdraw from this case.

Pursuant to Anders v. California, 386 U.S. 738 (1967), I have raised all possible points in Appellant's favor and have presented whatever argument may be made to support them. Appellant should be allowed additional time from the filing of this brief to raise any other points pro se.

Respectfully submitted,


LARRY R. KELLER

ARGUMENT

POINT I.

THE MERITS OF APPELLANT'S PETITION WERE ARGUED BY HIS COUNSEL OFF THE RECORD IN THE COURT'S CHAMBERS AND OUTSIDE THE PRESENCE OF APPELLANT, VIOLATING APPELLANT'S RIGHTS.

This Court will note from the transcript of the lower court proceedings that no record was made of the argument concerning Appellant's Petition.

The Court indicates the matter was argued in chambers. (T. 2)

Such argument off the record violates the provisions of Art. VIII, Sec. 17 of the Constitution of Utah and, therefore, the matter should be remanded to have argument placed on the record.

POINT II.

DURING APPELLANT'S TRIAL, THE TRIAL COURT'S REMOVAL OF THE CHARGE OF MURDER IN THE FIRST DEGREE FROM THE JURY'S CONSIDERATION OPERATED AS A DISMISSAL OF THAT AND ALL LESSER INCLUDED OFFENSES, THEREFORE INVALIDATING APPELLANT'S CONVICTION FOR MURDER IN THE SECOND DEGREE.

It is a well settled principle of Constitutional Law that the status of Jeopardy attaches to any criminal case which is dismissed by the Court after the jury is impaneled. [See Utah Code Annotated, §76-1-403 (4) as amended, which embodied the concept heretofore established at common law.]

Appellant was charged with and tried for the crime of Murder in the First Degree. At the end of the State's case, the judge removed that charge from the jury's consideration and ruled that the jury could only consider the crime of Second Degree Murder and its lesser included offenses. Such a ruling, Appellant argues, is tantamount to a dismissal of the charge of First Degree Murder after the jury was impaneled. Since there is no question Second Degree Murder is a lesser included offense in First Degree Murder, it seems logical that all lesser offenses rise or fall on the merits of the greater offense.

Therefore, Appellant argues, the dismissal of the charge of First Degree Murder automatically causes dismissal of all offenses which are lesser included. Therefore, Appellant's conviction for the lesser included offense of Second Degree Murder is invalid and his prayed-for Petition for Writ of Habeas Corpus should issue.

POINT III

THE UNITED STATES SUPREME COURT'S DECISION
IN FURMAN V. GEORGIA INVALIDATED UTAH CODE
ANNOTATED, §76-30-2, 3, and 4, (1953).

Appellant argues that the decision of the United States Supreme Court in Furman v. Georgia, 408 U. S. 238 (1972) made the statutes under which the appellant was convicted [Utah Code Ann. §§76-30-1, 76-30-3, and 76-30-4 (1953)] null and void.

POINT IV

UTAH CODE ANNOTATED, §76-30-3 (1953) WAS UNCONSTITUTIONALLY VAGUE AND THEREFORE ANY CONVICTION UNDER IT SHOULD BE DECLARED NULL AND VOID.

Appellant argues that the statute under which he was convicted, Utah Code Annotated, §76-30-3 (1953), was unconstitutionally vague in describing the offense of Murder in the Second Degree in that it failed to clearly define the elements necessary to constitute the offense.

POINT V

AT THE TIME OF THE COMMISSION OF THE OFFENSE, APPELLANT WAS SO INTOXICATED BY ALCOHOL THAT HE WAS UNABLE TO FORM THE REQUISITE INTENT PURSUANT TO UTAH CODE ANNOTATED, §76-30-3, (1953).

Appellant argues that he did not have the requisite intent required under Utah Code Annotated, §76-30-3 (1953), to constitute the crime of

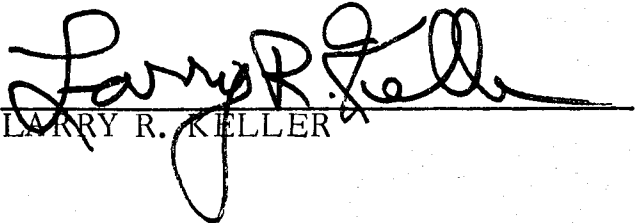
Second Degree Murder due to his intoxication on alcoholic beverages.

CONCLUSION

Counsel for Appellant has attempted to raise all issues which could conceivably be argued on behalf of Appellant, however, I ask this Honorable Court to allow Appellant himself to raise any additional issues pro se.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with Anders v. California, supra, I have caused to be mailed a copy of the foregoing brief and Request for Withdrawal of Counsel to Howard Bennett Smith, Utah State Prison, P. O. Box 250, Draper, Utah, this 3RD day of December, 1975.


LARRY R. KELLER