

1986

State of Utah v. Todd Emmit Turner : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *Utah v. Turner*, No. 198620920.00 (Utah Supreme Court, 1986).
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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

1986

20920

STATE OF UTAH,)
)
 Plaintiff-Respondent,) CASE NO. 20920
)
 V.) PRIORITY 2
)
 TODD EMMIT TURNER and DARIN)
 BRENT McEWAN,)
)
 Defendants-Appellants.)

REPLY BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SUMMIT COUNTY

THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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FILED
DEC 1 1986

Clerk, Supreme Court, Utah

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REPLY BRIEF OF APPELLANT

ARGUMENT

DEFENDANT IS ENTITLED TO RAISE THE UNCONSTITUTIONALITY
OF THE COURT'S JURY INSTRUCTIONS FOR THE FIRST TIME
ON APPEAL

Respondent would have this Court believe that due to the failure of Appellant's Counsel to object to the Court's jury instructions, at trial, Appellant is absolutely barred from raising objections to said instructions for the first time on appeal.

Respondent's posture is not the law in this State.

The cornerstone ruling on this issue is represented by the case of STATE v. COBO, 60 P2d 952 (Utah, 1936). In this ruling our state Supreme Court, via the opinion of Justice Hanson, held: "We recognize the well settled general rule in this and in

other jurisdictions that alleged errors with respect to instructions and refusing requests to instruct ordinarily will not on appeal be considered or reviewed, unless sufficient exceptions thereto were taken in the Court below by the party aggrieved. Such rule, however, is not uniform as to all errors so committed. In many jurisdictions there are well recognized exceptions to the general rule, especially in criminal cases involving capital offenses or other grave and serious offenses of long term imprisonment... when palpable error on the face of the record involved violations of fundamental rights and privileges of manifest prejudice to the party aggrieved."

Further on in the COBO case the Court, in granting that Defendant a new trial, stated: "Here, we think, on the face of the record, manifest error was committed by the Court in charging the jury...and so misdirected the jury as to the law in such particular as to deprive the Defendant of a fair trial. In such case, the state has no right to hold the judgment, and we think it is the clear duty of the court to notice the error and correct it."

This basic philosophy has withstood the test of time and has been cited in many cases as being the position of this State's Supreme Court. (SEE: STATE v. WINGER, 485 P2d 1398 [1971]; STATE v. NORTON, 675 P2d 577 [1983]; STATE v. STEGGELL, 660 P2d 252 [1983]; STATE v. SHULSEN, 716 P2d 787 [1986])

It is from these same roots that this Appellant's argument

grows. The trial court misdirected the jury by instructing them with a jury instruction already determined by this court to be blatantly unconstitutional. (SEE: STATE v. CHAMBERS, 709 P2d 321 [Utah, 1985]) This point is acknowledged by the respondent in their brief at page 6. Appellant contends that it was the duty of the trial court to instruct the jury within constitutional guidelines. To do otherwise, as it did, deprived the Defendant of a fair trial.

Thus, the COBO doctrine, referred to in later cases as "exceptional circumstances," dictates that this Court, on appeal, look at the error Appellant raises herein for the first time.

Further, since this Appellant was sentenced to an indeterminate term of one to fifteen years on each burglary conviction, Appellant's case also fits within the "exceptional circumstances" realm of the COBO ruling, since Appellant was sentenced to a "...serious offense of long term imprisonment...." (SEE: COBO, Supra, at pg. 958)

CONCLUSION

Appellant's argument is based solely on the philosophy spelled out in the COBO case which, Appellant contends, fits his situation exactly. Based upon the foregoing, Appellant's original Brief, and the record before this Court, Appellant submits that the Defendant's burglary and theft convictions should be overturned and a new trial granted.

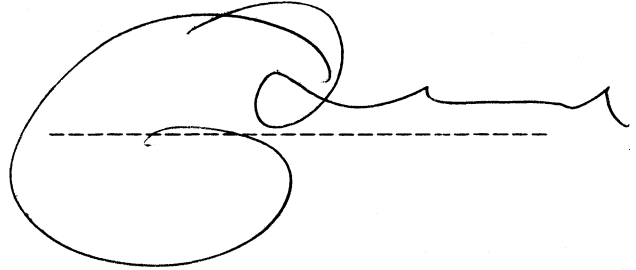
Dated this 27th day of November, 1986.


ELLIOTT LEVINE, Attorney for
Appellant

CERTIFICATE OF HAND-DELIVERY

THE UNDERSIGNED certifies that they hand-delivered 4 true
and correct copies of the foregoing document, on the 27th day of
November, 1986 to:

EARL F. DORIUS, ASST. ATTORNEY GENERAL
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114

A handwritten signature in black ink, appearing to read "Earl F. Dorius", is written over a horizontal dashed line. The signature is cursive and extends to the right of the line.