

1979

State of Utah v. Clinton Roberts : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

CLINTON ROBERTS,

Defendant-Appellant.

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Case No. 16098

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH
JUDICIAL DISTRICT COURT, IN AND FOR UTAH
COUNTY, STATE OF UTAH, THE HONORABLE
GEORGE E. BALLIF, JUDGE, PRESIDING

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FILED

MAR 19 1979

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Plaintiff-Respondent,	(
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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH)	
	(
Plaintiff-Respondent,)	
	(
vs.)	
	(
CLINTON ROBERTS,)	Case No 16089
	(
Defendant-Appellant.)	
	(

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Clinton Roberts, was charged with a violation of Section 76-6-501, Utah Criminal Code, a felony of the second degree, in that on or about the 24th day of March, 1978, at Utah County, State of Utah, the appellant, with purpose to defraud, uttered a bank check in the amount of \$331.14, purporting to bear the signature of David Farmer, knowing at the time that the check was forged.

DISPOSITION IN THE LOWER COURT

The court below found the appellant guilty as charged, upon a verdict to that effect, and sentenced the appellant to confinement in the Utah State Prison.

for a period of not less than one nor more than fifteen years.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order reversing the conviction and releasing the appellant from confinement at the Utah State Prison. In the alternative, appellant seeks an order directing that the appellant be resentenced after the appellant and his attorney have been granted access to the pre-sentencing report, and opportunity to be heard upon the relevance or materiality of the evidence contained in that report.

STATEMENT OF THE FACTS

Appellant was charged in an information with a violation of Section 76-6-501, U.C.A., accusing him of uttering, with a purpose to defraud, a bank check in the amount of \$331.14, purporting to bear the signature of David Farmer, and drawn on the account of All-Weather Insulation Company. During the course of the trial, held before the Honorable George E. Ballif, in the Fourth Judicial District Court of Utah County, the appellant elected to take the stand and testify on his own behalf. Under the direct examination, the appellant testified to his involvement in the events which lead to the charges against him. He substantially denied the charges and testified that he did not utter any check, nor write

been uttered. Upon cross-examination, the prosecutor opened with the question, whether the appellant had ever been convicted of a prior felony. Pursuant to Section 78-24-9, U.C.A., the appellant was required by law to disclose that he had been convicted of a previous felony; therefore the appellant answered the question, both as to the fact of the previous felony and as to its nature.

Following the rendering of verdict of guilty and prior to sentencing, the appellant requested that he be furnished with a copy of the pre-sentence report. That request was granted by the court, and the sentencing was set for the 8th day of September. Sentencing was later reset for the 15th day of September. On that date, the appellant and his attorney appeared before the court for the sentencing. However, the appellant objected at that time that he had not been furnished a copy of the pre-sentence report and had not been given access to the information contained therein. Despite the objection of the appellant, the court, having before it a copy of the report, proceeded to sentence the appellant, relying upon the information contained in the report to deny appellant's pleas for leniency and to impose a sentence of confinement.

ARGUMENT

- I. THE APPLICATION OF SECTION 78-24-9, REQUIRING A WITNESS TO DISCLOSE THE FACT OF HIS PREVIOUS CONVICTION, DENIED THE APPELLANT EQUAL PROTECTION OF THE LAW.

THE EQUAL PROTECTION TEST

A number of analytical tests have been used by the courts under the overall category of equal protection, and the test to be applied under any set of circumstances depends upon the nature of those circumstances. According to the United States Supreme Court:

It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "invidious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10.

Thus, the crucial question in this case involves a consideration of both the interests of the appellant which were violated when he was compelled by law to testify as to his prior conviction and the interests of the state which are promoted by such a law. This is further clarified by the Court in Police Department of City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L. Ed. 2d 212 (1972). There, in the context of a criminal law which imposed a classification alleged to be discriminatory by one who was prosecuted thereunder, the Court stated:

As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See Beard v. Beard, 404 U.S. 253, 254, 30 L.Ed.2d 225, 226, 78 S.Ct. 254, 30

Co., 406 U.S. 164, 92 S.Ct. 1400, 31, L.Ed.2d 768 (1972); Dunn v. Blumstein, 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). 408 U.S. at 95, 92 S.Ct. at 2290.

In the context of criminal prosecutions, then, the Equal Protection Clause requires that whenever the state imposes a differential treatment on different classes of persons, that differential treatment must serve positively to promote some interest of the state which is rationally related to the discrimination.

The United States Supreme Court has noted that criminal procedures are very closely tied with the "fundamental rights" of the defendant; and a less than completely "differential" approach must be taken when examining state laws in the criminal context. Thus, for example, the Court found that a law which required criminal appellants to furnish trial transcripts as a condition to the processing of their appeals was violative of equal protection principles because, under the practical circumstances involved, indigent defendants were unable to meet the requirement and were thus discriminated against through the application of the law. Since the discrimination did not further the purposes of the state in any way, it fell before the constitutional challenge. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585 (1956). Similarly, where a law directed the commitment of incompetent defendants on terms which were harsher than those imposed upon non-criminal incompetents, the Court stated:

The harm to the individual is just as great if the State, without reasonable justification, can apply standards making his commitment a permanent one when standards generally applicable to all others afford him substantial opportunity for early release . . . As we noted above, we cannot conclude that pending criminal charges provide a greater justification for different treatment than conviction and sentence. Jackson v. Indiana, 406 U.S. 729, 729-730, 92 S.Ct. 1845, 1853-1854 (1972).

The Court thus made clear its judgment that the fact that criminal charges are pending against an accused is not alone a justification for allowing the State to impose upon him burdens which are not imposed upon others in analogous situations. In striking down the law, the Court in Jackson recognized that a classification affecting the accused's rights in a discriminatory way must be based upon a substantial justification which is closely related to the classification.

Therefore, in determining whether the State has violated the rights of the appellant by requiring him to disclose the facts of his previous conviction, the Court must consider whether the purpose for the State's requirement is sufficiently important to override the appellant's interest in not disclosing his prior conviction and whether that purpose is furthered by requiring a certain class of persons to disclose such convictions while allowing other classes of persons not to disclose such evidence.

THE CLASSIFICATORY SCHEME

A brief survey of the relevant statutes and rules

of the State of Utah reveals the classificatory scheme which appellant asserts denies his rights to equal protection of the laws.

First, section 78-24-9, U.C.A. requires that a witness, though not required to give evidence which would be irrelevant, degrading, or revealing of prior misdemeanors, must nonetheless disclose whether or not he has been convicted of a felony. The section reads:

A witness must answer questions legal and pertinent to the matter in issue, although his answer may establish a claim against himself, but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it is to the very fact in issue or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction of felony.

Second, Rules 21 and 22 of the Rules of Evidence prohibit the use of evidence concerning criminal convictions not involving dishonesty or false statement, evidence of character traits other than truth, honesty, or integrity, or evidence of specific instances of conduct, but allow by reference to Section 78-24-9 the use of evidence of prior felonies to establish dishonest or untruthful character. Rule 21 states:

Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility, except as otherwise provided by statute.

Rule 22 states further, in part:

As affecting the credibility of a witness. . .
(c) evidence of traits of his character other than truth, honesty, or integrity of their opposites.

shall be inadmissible; (d) evidence of specific instances of his conduct relevant only as tending to prove a trait of his character, shall be inadmissible.

Finally, Rule 55 of the Rules of Evidence prohibits the use of evidence of prior convictions to show that the accused had a disposition to commit crimes; but again the rule is subject to the qualification of Section 78-24-9, allowing a witness to be compelled to disclose evidence of prior convictions even though that witness may be the defendant. Rule 55 Reads in part:

Subject to Rule 47, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong as the basis for an inference that he committed another crime or civil wrong on another specified occasion but, subject to Rules 45 and 48, such evidence is admissible when relevant to prove some other material act. . .

For the purposes of this appeal, the appellant asserts that these statutes and rules of the State of Utah thus create an invidious discrimination against him, depriving him of equal protection of the laws, by requiring him to admit non-relevant evidence of his past; a forced statement of a prior conviction. Secondly, the admission of such non-relevant evidence minimizes his opportunity for a fair trial upon the relevant issues as compared to a defendant not yet having been convicted of a previous felony.

THE STATE AND INDIVIDUAL INTERESTS

Laws allowing the admission of evidence of the previous felony convictions of an accused are usually justified on the basis of the value of such evidence in impeaching the defendant who takes the witness stand. However, a number of courts have recognized that the inherent tendency of such evidence to cause prejudice against the accused is sufficient reason to limit, if not to exclude altogether, the admission of evidence concerning previous felony convictions. The United States Court of Appeals for the District of Columbia, in its opinion in Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), established the rule, now codified in the Federal Rules of Evidence, Rule 609, that the Court must exercise discretion in the admission against an accused or evidence of his prior convictions. There, in the context of a statute which did not expressly mandate the admission of evidence of prior convictions against an accused, the court held:

The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. 348 F.2d at 768.

The court also outlined the factors which a trial

court should consider when determining whether evidence of prior convictions is sufficiently relevant and probative to warrant its admission in spite of its prejudicial effect.

In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction. 348 F.2d at 769.

The rationale of Luck was further clarified in Gordon v. United States, 383 F.2d 936 (D.C.Cir. 1967), where the trial court admitted evidence of the accused's previous convictions and the appellate court upheld his exercise of discretion in that regard. The reasoning of the court in Gordon is instructive of the type of justification which might be required in order to uphold the Utah law against a constitutional attack. The court declared:

The rationale of our Luck opinion is important; it recognized that a showing of prior convictions can have genuine probative value on the issue of credibility, but that because of the potential for prejudice, the receiving of such convictions as impeachment was discretionary. The defendant who has a criminal record may ask the court to weigh the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility. 383 F.2d at 939.

At least one court has recently determined that the admission of evidence of prior convictions offends

due process grounds rather than equal protection grounds. Again, examination of that Court's rationale aids us in determining whether there might be justification for the classificatory scheme created by the Utah laws. The Supreme Court of Hawaii, in State v. Santiago, 492 P.2d 657 (1971), first discussed the harmful effect of such evidence:

A number of authorities have come to believe that when the witness to be impeached is also the defendant in a criminal case, the introduction of prior convictions on the issue of whether the defendant's testimony is credible creates a substantial danger that the jury will conclude from the prior convictions that the defendant is likely to have committed the crime charged. The danger of prejudice is scarcely mitigated by an instruction to consider the prior convictions only in determining whether or not the defendant's testimony is credible. To inform the jury in a rape case that the defendant has a prior rape conviction and then instruct them to consider the conviction only in evaluating the defendant's credibility is to recommend "a mental gymnastic which is beyond, not only their power, but anybody else." As the United States Supreme Court stated in Bruton v. United States, 391 U.S. 123, 135, 88 S.Ct 1620, 1627, 20 L.Ed.2d 426 (1968), [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.

The court then went on to discount the alleged benefits of the admission of prior convictions evidence by reasoning in this manner:

Despite the burden imposed on the defendant's right to testify, we might nevertheless sanction admission of prior crimes to impeach credibility if there were some value outweighing the burdens imposed. It is apparent, however, that prior convictions are of little real assistance to the jury in its determination of whether the defendant's testimony is credible. When the prior crime has nothing to do with dishonesty, there

may be no logical connection whatsoever between the prior crime and the determination of whether the defendant may be believed. Even if the crime involves dishonesty or false statements, in light of the fact that every criminal defendant may be under great pressure to lie, the slight added relevance which even a perjury conviction may carry would not seem to justify its admission. Furthermore, since the jury is presumably qualified to determine whether or not a witness is lying from his demeanor and his reaction to probing cross-examination, there would appear to be little need for evidence of prior convictions even if the crime involves false statements. 492 P.2d at 657.

The court concluded that the benefits which allegedly derive from the admission of prior convictions evidence were not sufficient to justify the use of such evidence against an accused in light of the great prejudicial harm which such evidence does to the accused in the eyes of the jury.

In a number of decisions, the Supreme Court of Utah has declared its policy in relation to the admission of evidence of prior convictions against an accused who testifies. The primary opinion construing Section 78-24-9 and applying it to defendants as well as other witnesses is State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963). There, in upholding the use of such evidence against an accused/witness, the court stated:

The apparent purpose and reason for permitting the prosecution to question the accused regarding prior felony convictions is to affect his credibility as a witness. 382 P. 2d at 409.

However, the court held that the use of evidence which disclosed the details and circumstances of those crimes, as well as the details of other incidents which did not amount to formal convictions, went beyond the permissible

a defendant/witness's prior convictions, they fail to disclose why the state should then exclude other types of testimony which would seem to promote the same purpose as evidence of prior convictions. In State v. Simmons, for example, the Supreme Court of Utah upheld a trial court conviction which followed an objection to certain evidence by the accused. The prosecution had elicited from the accused evidence of a prior conviction which turned out on cross-examination to be a misdemeanor. The trial court instructed the jury to disregard the evidence on the grounds that it concerned a misdemeanor rather than a felony. The court, however, did not reveal why the evidence of the conviction should be relevant so long as it concerned a felony, but became irrelevant upon a finding that it was only a misdemeanor. See 28 Utah 2d 301, 501 P.2d 1206 (1972).

Certain decisions of the Utah Supreme Court have hinted that there is indeed no strong justification for the discriminatory treatment of defendant witnesses by the Utah laws. The court has recognized that evidence of prior acts may be extremely prejudicial against a defendant. In State v. Peterson, 23 Utah 2d 58, 457 P.2d 532 (1969), the Court held that where the prosecution questioned the defendant about his previous use of marijuana, the testimony was prejudicial and required remanding the case for a new trial, even though the trial court had instructed the jury to disregard the statements, and

An even more questioning opinion was expressed by the Court in State v. Harless, 459 P.2d 210 (1969).

There, the court stated:

Defendant's argument on his second point is that asking him if he had been convicted of felony, and his necessary answer that he had (fictitious checks, and auto theft in violation of the Dyer Act), so prejudiced his cause in the eyes of the jury that he did not have a fair trial. That this type of interrogation is generally allowed derives from the idea that there is a basis in reason and experience why one may place more credence in the testimony of one who has lived within the rules of society and the discipline of the law than in that of one who has so demonstrated antisocial tendency as to be involved in and convicted of serious crime. This rule is sometimes criticized as unfair to the accused on the ground that he has but the Hobson's choice of unfavorable alternatives: either not to take the stand and thus lose whatever benefit that might have, or take it and have his felony record exposed, in which event he risks the likelihood that the jury may convict him because of his prior misdeeds rather than upon the evidence as to the instant charge. . . . The exposure of the felony record of an accused of course does not mean that his testimony is necessarily to be entirely disbelieved or discredited, but inasmuch as it is the responsibility of the jury to judge the credibility of the witnesses, it is deemed to be something which they are entitled to know so they can take it into consideration with all the other facts and circumstances in determining what they will believe. 459 P.2d at 211.

While recognizing the weaknesses in the state's justification for section 76-24-9, and noting the argument usually made against it, the court nonetheless felt compelled to uphold the statute; but it is noteworthy that no constitutional argument was made, and that the court did not offer any justification for the provisions of the law prohibiting other types of evidence which would serve the state's purpose equally as well.

rationale for justifying the discriminatory treatment of the appellant in this case. Far from that, the laws seem to establish just the opposite, *ie* that the construction allowing the use of felony convictions against the accused when he testifies as a witness is a clear aberration in the logic and structure of the laws of evidence. The statutes, for example, seem to place great importance upon the quality of the evidence, allowing its admission only if it is "legal and pertinent to the matter in issue" (Sec. 78-24-9), if it established a crime "involving dishonesty of false statement" (Rule 21), if it refers to the character traits of truthfulness, honesty, or integrity of the witness (Rule 22), or if it is relevant to prove a material fact" (Rule 55), but denying its admission whenever it tends to degrade the character of the witness or is irrelevant (Sec. 78-24-9), concerns a crime not involving dishonesty or false statement (Rule 21), refers to character traits other than truthfulness, honesty, and integrity (Rule 22), or is used to show that the defendant had a disposition to commit crime (Rule 55). In light of the sweeping scope of section 78-24-9, which requires the admission of evidence of prior convictions regardless the quality of such evidence for impeachment or substantive purposes, it would seem that the legislative purpose for the body of laws governing admissibility of evidence in Utah cannot be used to justify the discriminatory effects

THE INVIDIOUS DISCRIMINATION

Appellant therefore asserts that the application of Section 78-24-9 to him in this case, whereby he was required to testify as to a prior felony conviction, violates his right to equal protection of the law. He submits first that the admission of his testimony as to a prior conviction of issuing a bad check, violative of Section 76-6-505, U.C.A., imposes a burden upon him which deters his taking the witness stand. The fact, in that, he is subject to the prejudicial impact of the evidence of his prior conviction while other defendants, who may also have committed felonies, are not required to bear the same burden. Secondly, appellant asserts that the rule cannot be sustained on the basis of the state's purpose in implementing the impeachment of the defendant as a witness because, as applied, the law bears no relation to the substantive or impeachment value of the evidence which it admits, but rather admits evidence of felonies regardless of their probative value or relevance. Again, the law is without basis in logic or reason, since it is not closely drawn to serve the limited purpose of impeachment, but rather admits evidence of all felonies regardless of their impeachment value.

FAILURE TO OBJECT

The appellant's failure to object to the admission of the evidence at trial will not prevent the resolution of the issue on appeal, since the rule that issues not raised at trial will not be heard on appeal is not an absolute principle. The United States Circuit Courts of Appeals have at various times declared that there are exceptions to the usual practice. Thus, issues not raised at trial may still be dealt with on appeal when they concern, for example, the denial of First Amendment rights, Founding Church of Scientology of Washington, D.C. v. U.S., 409 F.2d 1146 (D.C. Cir 1969); equal protection of the laws, Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973); significant questions of general impact on the public, Toymenka, Inc. v. Mount Hope Furnishing Co., 432 F. 2d 722 (4th Cir. 1970); and the protection of due process against manifest injustice, Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970).

II. THE DENIAL OF APPELLANT'S REQUEST FOR A COPY OF THE PRE-SENTENCE REPORT EFFECTIVELY DENIED HIM HIS RIGHTS TO COUNSEL AND TO CONFRONTATION OF THE WITNESSES.

The State of Utah has no statute or rule expressly authorizing the use of a pre-sentence report by the court, nor does it have a law demanding that any such report used be made available to the defendant in a criminal case. However, the combined effect of the statutes dealing with the subject of sentencing is that the defendant must be allowed to examine any such report and have an opportunity to rebut the evidence contained therein. Otherwise, he is denied his rights of counsel and confrontation of the witnesses.

Section 76-3-404 of the Utah Code implicitly authorize the use of pre-sentence reports and requires that such information be made available to the defendant. The statute states in part:

In felony cases where the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the pre-sentence report, the court may, in its discretion, commit a convicted defendant to the custody of the division of corrections for a period. . . . By the expiration of the period of commitment, or by the expiration of the additional time as the court shall grant, not exceeding a further period of ninety days, the defendant shall be returned to the court for sentencing, and the court, prosecutor, and the defendant or his attorney shall be provided with a written report of results of the study, including whatever recommendations the division of corrections believes will be helpful to a proper resolution of the case.

By reference to the use of pre-sentence reports, and by the provision of this section for more detailed studies

intention for the courts to make use of such reports. By its explicit command that the more detailed type of report be made available to the defendant and his attorney, the legislature expressed an intention that the defendant should have access to such information whenever it will be used in the proceedings against him. That intention reasonably includes the availability to the defendant of the pre-sentence report itself.

Further provisions of the Utah Code make reference to the right of the defendant to have access to the information in the pre-sentence report. Section 77-35-12 provides that the judge, having discretion as to the punishment of the defendant, may consider evidence in aggravation or mitigation of that punishment.

When discretion is conferred upon the court as to the extent of punishment, the court, at the time of pronouncing judgment, may take into consideration any circumstances, either in aggravation or mitigation of the punishment, which may then be presented to it by either party.

However, whenever such evidence is used, it must be brought out in open court, under conditions conducive to the rights of the defendant to confrontation and representation. Section 77-35-13 mandates this result by stating, in part:

The circumstances must be presented by the testimony of witnesses examined in open court. . . . No affidavit or testimony, or representation of any kind, verbal or written, shall be offered to or received by the court or a judge thereof in aggravation or mitigation of the punishment, except as provided in this section.

Similar statutes have been construed by other states to require the submission to the defendant of a copy of the pre-sentence report before sentencing. In Kuhl v. District Court of County of Lewis and Clark, 139 Mont. 536, 366 P.2d 347 (1961) the Supreme Court of Montana construed almost identical statutes, R.C.M. 1947, sections 94-7813 and 94-7814, to mean that the trial court must treat evidence contained in a pre-sentence report exactly as it would any other evidence in aggravation or mitigation of punishment, and that the provisions of the statutes for hearing and examination are mandatory.

As a policy matter, such a conclusion is recommended by a number of authorities. According to 40 ALR3d 681, 699;

The American Law Institute's Model Penal Code provides that before imposing sentence the court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. . .

The President's Commission on Law Enforcement and Administration of Justice recommends that in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire pre-sentence report.

And an American Bar Association committee has adopted the position that fundamental fairness to the defendant requires that the substance of all derogatory information which adversely affects his interest and which has not otherwise been disclosed in open court should be called to the attention of the defendant, his attorney, and others who are acting on his behalf.

The United States Supreme Court has also rendered its opinion that the rights of the defendant often demand

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that he be given a copy of the pre-sentence report. In Kent v. United States, 383 U.S. 562, 86 S.Ct. 1045 (1966), the court held that a juvenile involved in proceedings to waive the jurisdiction of the juvenile courts is entitled to copy of the social records of the juvenile and to have counsel to examine and refute the material therein. At 383 U.S. p. 563, the Court stated:

. . .if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge-which is protected by the statute only against "indiscriminate" inspection-be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation.

Similarly, in a case where the defendant was not represented by counsel and the trial court made use of information in the pre-sentence report, the Court held that the right to counsel had been violated:

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. . . In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner. Townsend v. Burke, 334 U.S. 736, 740-741, 68 S.Ct. 1252, 1255 (1948).

made use of undisclosed pre-sentence report materials is best illustrated by reference to the transcript of the sentencing hearing, in which the record shows that the court made the following statements in response to the defendant's requests for leniency:

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MR. CARTER: Your Honor, maybe I'm misinformed, but it's my understanding that the Court can allow probation, or any other form of sentence.

THE COURT: Well, that is a condition of probation, yes. But probation isn't indicated in Mr. Roberts case. His record is too long. He has been in trouble too much

* * * *

THE COURT: He has had probation revoked twice and he has had parole revoked twice. That's right, isn't it?

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THE COURT: I'm sorry, Mr. Roberts, but I'm afraid as far as giving you a chance on probation now is too late. I'm sure that what you do in the Utah State Prison with regard to pursuing what you're telling me you have got to do will affect when you can be released from there. And the seriousness of your desire to reform your life can be shown there. I can't put you on probation. I'm sorry. I would like to; it hurts me that I have to send anyone to prison, but I have no alternative in your case. Is there any legal reason why I shouldn't proceed to pronounce judgment, Mr. Carter:

MR. CARTER: Your Honor, we have not been supplied with a copy of the pre-sentence report in this matter. I would object to that. I think we would be entitled to it, to a copy of it, or at least knowledge as to what the facts of it are.

THE COURT: Well, I'll order that a copy of Mr. Robert's record be made available to you. * * *

Following the dialogue quoted above, the court

proceeded to judgment and sentencing without delay.

Appellant contends that these procedures violated his rights to counsel and to confrontation of witnesses because of the fact that the court relied upon information in the pre-sentence report, both disclosed information and information which was not disclosed, in making its decision not to place the appellant on probation. Inasmuch as Sections 77-35-12 and 77-35-13 of the Utah Code provide that all materials, whether written or oral, used in determination of punishment, must be submitted in open court for the purpose of allowing the defendant to appraise and rebut the evidence against him with the aid of confrontation and counsel, the appellant here was effectively denied his rights by being sentenced before a pre-sentence report had been made available to him.

CONCLUSION

The appellant respectfully submits, therefore, that his conviction should be reversed on the grounds that the trial court's admission of evidence concerning a prior conviction denied him equal protection of the laws and was prejudicial error. Further, and in the alternative, appellant requests that his sentence be terminated on the grounds that the trial court's refusal to provide appellant with a copy of the pre-sentence report prior to sentencing denied appellant his right to confrontation and counsel.

RESPECTFULLY SUBMITTED,



SHELDEN R. CARTER
Attorney for Appellant