2001

State of Utah v. James Eldon McNicol : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT

OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff and
Respondent,

vs.

JAMES ELDON McNICOL, JR.,

Defendant and
Appellant.

Case No. 14449

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APPELLANT'S BRIEF

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APPEAL FROM THE VERDICT AND CONVICTION IN
THE DISTRICT COURT OF TOOELE COUNTY, STATE OF UTAH
THE HONORABLE GORDON R. HALL, PRESIDING

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CASES AND AUTHORITIES

IN THE

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APPELLANT'S BRIEF

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DISPOSITION IN LOWER COURT

AND

NATURE OF CASE

The Defendant-Appellant McNicol appeals from the verdict of guilty before a jury tried on the 5th day of January, 1976, in the District Court of the Third Judicial District in and for Tooele County, State of Utah, the Honorable Gordon R. Hall presiding, whereafter he was sentenced to an indeterminate term as provided by law for the crime of second degree murder as charged.

RELIEF SOUGHT ON APPEAL

On appeal, Defendant seeks to have the verdict reversed and a new trial granted.

STATEMENT OF FACTS

On the 23rd of July, 1975, at approximately 10:30 p.m. Defendant and deceased were in an apartment where they had been living in Pine Canyon, Tooele County, Utah (Exhibit 2). There is some indication that the individuals were arguing or quarreling (Exhibit 2, R. 64). Defendant put his arm around her neck from behind until she "passed out" (Exhibit 2) and then stretched her out on the floor. Some 30 minutes later he determined she was

dead and thereafter removed her clothes and placed her in the bed (R. 8). The following evening on the 24th of July, 1975, defendant went to the Police Station in Tooele, Utah, and reported the occurrence to the Tooele County Sheriff. Thereafter, defendant was charged with the crime of criminal homicide, murder in the second degree, and Morris D. Young was appointed by the Court to defend him.

POINT ON APPEAL

REPRESENTATION BY APPOINTED COUNSEL WAS SO INEFFECTIVE AS NOT TO MEASURE UP TO THE REQUIRED STANDARD OF A COMPETENT MEMBER OF THE BAR RENDERING REASONABLY EFFECTIVE ASSISTANCE.

A defendant is assured of the right to counsel by Section 12, Article 1 of the Utah Constitution and by the Sixth and Fourteenth Amendments to the United States Constitution, (Gideon v. Wainwright, 372 U.S. 335) and this requirement of assistance of counsel is not satisfied by mere appearance of counsel, but requires as the test has been variously stated, "reasonably effective assistance" "no reasonably qualified attorney would have so acted" "within the range of competence demanded of attorneys in criminal cases" or "reasonably competent assistance of an attorney acting as the defendant's diligent, conscientious advocate" ...

that "defense counsel's performance must be reasonably competent within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (The test of whether the representation of counsel was "so woefully inadequate as to make the trial a farce and a mockery of justice" standard has largely fallen into disrepute.) (Beesley v. U.S., 491 Fed. 2d. 687, U.S. v. De Carter, 487 Fed. 1197.)

This Court has apparently adopted the more modern test, and in the case of Alires v. Turner, 22 Utah 2d, 118 (incidentally involving the same defense counsel involved in the instant case) at page 120 states:

> "The further question necessary to confront is this: is there a basis for believing that a better representation by counsel would have been of some advantage to petitioner?"

and goes on to state that a case will not be reversed for mere error or irregularity but only where it is substantial and prejudicial "that is, not unless the error is of sufficient importance that it might have had some effect upon the results". Further on page 121 in discussing the requirement for counsel this Court states:

> "The entitlement is to the assistance of a competent member of the bar who shows a willingness to identify himself with the interests of the defendant and presents such defenses as are available to him under the law and consistent with the ethics of the profession."

In examining the record herein it is interesting to note that the entire transcript in this second degree murder trial is 74 pages long and that the entire trial was completed between 9:00 a.m. with the jury retiring at 4:45 p.m. and the returning of the verdict at 5:27 p.m.

While different readers of this transcript might arrive at a different count, there are approximately 165 leading, and/or suggestive questions asked by the prosecutor on direct examination of the witnesses with only one objection from defense counsel. While many of these questions obviously are preliminary, many went directly to critical elements in determining guilt or the degree thereof. Further, there are many answers based on hearsay or conclusions by lay witnesses, again without objection or a motion to strike from defense counsel. While as noted the record is replete with such questions and answers, the following should serve as some typical examples: (Note: Non objectionable questions have been included for clarity.)

1. Direct Examination - William E. Pitt

Q. Did he appear to you to be able to know what he was doing what he had done?

A. Yes he did.

Q. Nothing out of the ordinary from a person who would be involved in such a circumstance would you say?

A. No I would not say out of the ordinary. (T. 18)

* * *

Q. And did he make any corrections as to the typed page and statement?

A. He made a few corrections in it.

Q. Now then did he indicate to you at that time as to the correction that it was in fact a full and complete statement?

A. Yes he did.

Q. So if he stated to you now three times what had occurred and that had been reduced to writing and he has reviewed it and made the corrections and then he signed it is that correct?

A. That's correct.

Q. As his statement. (T. 20)

2. Redirect Examination - Serge Michael Moore

Q. Dr. Moore I assume then from that statement that also if a person reached to grab a person by the neck or grab them with their hand or on the throat and then later pressure the other way would also fracture the hyoid bone?

A. That's correct. (T. 34)

3. Direct Examination - John C. Woods

Q. Did you notice in his evaluation at times he was somewhat vague about certain things and particularly the event that of the murder of Miss Pauline Alice Montoya?

A. Yes I did.

Q. And how did you account for the vagueness? Is that also this hostility directed inward to himself?

A. I think there are several factors yes. I think that some of that is the hostility the interjected hostility and I think that other part of it are simply his repressing information not being able to recall information as well as he might because of being under stress.

Q. Now is that repression and that vagueness memory is that with knowledge of doing that or is that because of neurological or physical problem of his?

A. I feel that that tends to be on a conscious level, yes.

Q. He's doing it to benefit himself, is that what you're saying?

A. It tends to benefit him, yes. (T. 39)

* * *

Q. You were evaluating him to determine whether he had criminal responsibility at the time of the act on July the 23rd, 1975.

A. Yes sir.

Q. Now, when you say criminal responsibility, what do you mean by that?

A. That he knew the nature, and quality, and wrongfulness of the act which he committed; and was n under an irresistible urge or impulse.

Q. So what you're saying then is that because of the evaluation, and the in depth evaluation of Mr. McNicol through this long period of time at your institution: you determined that he had the capacity to know the right or wrongfulness of his act on the 23rd, is that correct?

A. Yes sir.

Q. So when he did commit the act that he did agains Miss Montoya, you're saying, are you not, that h was responsible, that he knew the nature of this act and that it was wrong?

A. Yes sir.

Q. Now, you're talking also about an irresistible impulse or urge to do something; you say he was not acting under one of those things or that typ of a --

A. No. I did not believe that he was acting under an irresistible urge or impulse. There is the fact that he had been taking drugs prior to this and the question of the voluntary use of drugs and with the amphetamine type, and alcohol, we did not feel that this, however, entered into th issue of criminal responsibility.

Q. And in fact you found him to be able to detail what occurred in rather good detail in spite of those types of circumstances, is that not true?

A. Yes.

Q. Now, Dr. Woods, you spoke earlier about periodically Mr. McNicol will be a pretty good guy but then he'll go and explode or become hostile. Now, would your determination of those moments of explosion, or hostility, moments of anger, would they be responsible times and would he know what he was doing at those moments?

A. Yes.

Q. He would know the nature of his acts at those moments?

A. Yes. Yes he did know what he was doing at those moments. (T. 43)

* * *

Q. Mr. Woods, you have testified on cross examination that at times the defendant, McNicol, would have an aggressive outburst toward others, and have a tendency to harm others, is that correct?

A. Yes sir.

Q. I think that was consistent with your earlier testimony that you directed inward to himself or outward to others.

A. Yes sir.

Q. Now, at the time that he does that, he does that with responsibility that is, does he know the nature of his acts when he's in those aggressive outbursts --

A. Yes.

Q. -- so he can control himself?

A. Yes sir.

Q. And he knows whether or not it's right or wrong, that act?

A. Yes sir. (T. 47)

* * *

Q. You're saying at times he is capable of love and affection and moments when he is capable of aggression.

A. Yes sir.

Q. And at either times whether it's passive or aggressive, he does know the nature of his act?

A. Yes sir.

Q. And he knows the wrongfulness or the rightfulness?

A. Yes sir.

Q. So whether or not they're inconsistent with love and affection he still does -- that is it does not make him insane, is that correct?

A. Yes sir. (T. 48)

4. Direct Examination - Van O. Austin

Q. You mean that he could have prevented the crime that he did if he chose to do so?

A. He could have conformed his behavior to the requirements of the law, yes sir.

Q. Did you find that he was acting under irresistible impulses of any kind?

A. To my impression that he chose not to conform his behavior rather than lacked the ability to conform it. (T. 51)

* * *

Q. And in the event that that did occur, and Miss Montoya exerted some kind of force with a broom, or with any of her physical self -- an aggressive outburst on the part of Mr. McNicol did in fact occur; would your testimony still be the same that he would be able to control that outburst?

A. It's my impression he would have the ability to control the outburst if he chose to.

Q. But that he would be able to determine that of himself, knowing the wrongful nature of his act, if he did that?

A. I think so.

Cross-examination by defense counsel varies from none to cursory to completely re-emphasizing points made by the prosecution on direct examination. Examples follow:

1. Cross-examination William E. Pitt.

This cross-examination consists of a couple of questions soliciting a fact already in evidence that Mr. McNicol did not re-enter the apartment with the investigating officers since he didn't want to see the body. Yet, some of this witness's testimony was extremely damaging, e.g. when he testified in relation to a question as to what defendant had said, he answered: "He told me that

he had strangled his girl friend Alice Montoya to death. He said that he had grabbed her from behind like they had taught him in the service. He stated they taught him to do it in twelve seconds but he done it in ten." (T. 7)

Obviously, from the foregoing a jury would conclude that there was a man trained and experienced and taught to kill with his hands in hand to hand combat. The exact words used by the defendant could be extremely important to a jury's decision in this matter and a searching cross-examination may well have revealed that the words were not exactly as stated or that the officer's memory as to the exact words used was faulty, and this is particularly true since these words do not appear in defendant's written statement. (Exhibit 2)

Further the following which incidentally was brought out on cross-examination by the prosecution at T. 68:

> "Q. You learned that method of disabling a person in the service, did you not?
>
> A. I did not, it was shown to me."

would seem to indicate the possibility or even probability that defendant, rather than having been skilled and experienced in hand to hand combat was merely subjected, probably along with another group of bored recruits, to a lecture, demonstration or training film on the subject. In any event, the matter was never pursued in depth by the defense counsel.

2. Cross-examination Dr. Serge Michael Moore.

After defense counsel had gone in to the subject with Dr. Moore of the fragility of the hyoid bone and brought out the following:

> " ... only it fractures and there is hemorrhage under the layers that cover the bone, and swells the bone itself. The hemorrhage is also surrounding the tiessues that are supporting that hyoid bone in the neck." (T. 31)

and though Dr. Moore had testified that death was due to a decreased blood flow to the brain, defense counsel never exploited the possibility that the swelling above-mentioned could result in shutting off such a blood flow. Instead, he reemphasized the doctor's testimony that the neck in the crotch of the elbow would not fracture said bone by asking the following even though defendant's testimony was that he put his arm around her neck:

> "Q. I see. All right. Now, going back to your statement that as I understand your statement, just the neck in the crotch of the elbow (indicating) of itself would not produce a fracture that we are talking about?
>
> A. No. That in itself no. It had to be direct pressure of either the hand or fingers to the wing of the bone that I have mentioned." (Emphasis supplied.)

3. Cross-examination of John C. Woods.

Again, cross-examination merely emphasizes and strengthens the prosecution's case:

"Q. Doctor, in your examination of the defendant, did you determine whether or not at the time of the act the defendant had extreme hostility or hatred toward the victim?

A. I would say yeah, in my opinion, yes, he did.

Q. In your opinion, do you think that that was present in this instant?

A. Do I think that he was aggressive? Yes. I do. (T. 44, 45)

* * *

Q. Yes. Now, would you say that this explosive behavior of the moment of the situation we're talking about was the result of sudden passion or quarrel?

A. It probably had something to do with -- most likely had something to do with an ongoing quarrel; but I do not feel that it was explosive. There is a difference between an aggressive outburst and an uncontrolled, explosive outburst.

Q. Are you saying then that in this instance there was not an explosive outburst of behavior?

A. Yes.

Q. Well, on a sudden, did you say -- what did you say then as to the exhibit of passive aggressive tendency when a person wants to punish himself?

A. That there will be aggressive outbursts.

Q. Aggressive outbursts?

A. That's different than explosive.

Q. Okay. Would you explain?

A. Aggressive outbursts have -- there is more ability to control oneself if one chooses to; an explosive outburst gives the connotation that a person does not have that ability to control themselves; and it is my opinion that Mr. McNicol had the ability to control himself if he had chosen to." (T. 46-47)

4. Cross-examination Dr. Van O. Austin:

During the cross-examination of Dr. Austin the following occurred:

"Q. Dr. Austin, you examined in these interviews, the defendant quite thoroughly, did you not?

A. As thoroughly as I thought it was possible.

Q. Yes. Did he tell you in detail what happened?

A. He told me most of the details of the crime which apparently happened.

Q. Could you repeat those details?

A. Is it our job to investigate?

THE COURT: Mr. Young, generally this is not done and it's coming from you as a defense; and the doctor is hesitant to do that. He has some responsibility to Mr. McNicol as in the circumstances under which the examination was conducted."

After the Court interrupted the doctor as he started to answer, the prosecutor interposed an objection on the grounds that he didn't think it was the purpose of the doctor to find out the details of the crime, which objection was sustained. (T. 51-52)

What defense counsel's purpose was for this inquiry is not known and it would appear that the Court was attempting to protect the defendant. However, if there was a purpose in pursuing the matter, we will never know from this record, since after the objection was sustained,

> "Q. (By Mr. Young) Did you determine, doctor -- well, strike that, no more questions." (T. 52)

which ended the inquiry.

5. Recross-examination Dr. Van O. Austin:

On recross-examination defendant's counsel further emphasized the prosecution's case:

> "Q. Yes. And do you state that he was not acting at the particular time under any irresistible impulse?
>
> A. That's right, sir.
>
> Q. And that he knew the nature of his acts?
>
> A. That's right, sir.
>
> Q. Are you saying then that in your opinion he intended to do her harm?
>
> A. I can say that he had the capacity to form the intent to do her harm.
>
> Q. But do you --
>
> A. I cannot or I say I cannot say whether or not he had the intent to do her harm, that is not my job to get that.
>
> Q. Yes. He had the capacity to.
>
> A. To form the intent."

6. Cross-examination of Allan James - none.

The direct examination of the defendant McNicol covers a total of four pages of the transcript, T. 62 through T. 65. Not including preliminary questions the prosecutor objected some seven times, all of which were sustained by the Court as were motions to strike, and it appears that defense counsel either through inability to rephrase his questions or a lack of pre-trial preparation with the defendant failed to adequately probe matters important to possible defenses or to counter adverse impressions created on cross-examination by a redirect examination of defendant.

One area in the evidence which may have had a very decided effect as to the degree of guilt in the minds of the jury may have been the completely unexplained failure of defendant on discovering that Miss Montoya was dead to go for help and/or report same and they very well may have taken such conduct as an indication of a "depraved indifference to human life." Yet, there are indications in the record at T. 39 of a vagueness of memory as to the details of the occurrence and further reference to amnesia (Ex. 18) which might well be a clue to a possible explanation as to why the defendant did what he did and failed to report the matter until the following evening. In any event, from this record it can only be concluded that the matter was not pursued and no attempt was ever made to explain this unusual conduct.

An area which might have borne some fruit if probed was a reference to the use of drugs and/or alcohol by the defendant in the testimony of Dr. Woods (T. 42-43). However, the matter was never explored by the defense either in presenting its case or in cross-examination of the witness.

Another area which was not explored on cross-examination of doctors Woods and Austin was the question of the degree of their qualification, although from their testimony would appear that neither was a qualified psychiatrist but only held an M.D. degree. (T. 35 and T. 49)

Admission of Exhibits.

The prosecution introduced 20 Exhibits in this trial, none of which were objected to by defense counsel. While none appear particularly prejudicial, several could be objected to on technical grounds and lack of such objections serve to further illustrate counsel's conduct of the defense.

Jury Instructions.

As far as can be determined from a review of the record and transcript, defense counsel submitted no requested jury instructions nor did he take exception to any of those given. Yet, an examination of Instruction No. 11 (R. 65) indicates it fails to inform the jury that if the evidence has not established one or more of the elements of the crime beyond a reasonable doubt the are then to proceed to consider the lesser included offenses.

While an examination of all of the instructions as to lesser included offenses and the verdict form furnished may have sufficiently informed the jury to this effect, it still remains a possibility that one or more of the jurors could have been confused and believe that they either must convict the defendant of criminal homicide, murder in the second degree, or acquit him because of this omission.

Further, exception could have been taken to Instructions 11 and 12 on the grounds that Instructions 11 and 12 are confusing in that they fail to adequately differentiate between the reckless conduct required for conviction of the different included offenses.

CONCLUSION

This short transcript in a second degree murder trial is so replete with errors, omissions and the failure to pursue possible defenses that even though any one of these matters in and of itself might not be serious enough to require a reversal, the entire picture presented was one of a completely inadequate defense.

As was said in the case of U.S. v. Merrit, 528 Fed. 2d 650, C.A. 7 1976, in reversing a case for ineffective assistance of counsel:

> "The cumulative effect of several incidents provide reasonable grounds for questioning counsel's professional judgment and skill though standing alone none would lead to the conclusion that counsel had not met a minimum standard of professional representation."

Actually, to obtain a comprehensive feeling for the inadequacies of representation, it is respectfully requested that the members of the Court read this transcript in its entirety which in view of its brevity should not unduly impose on the time of any member of the Court.

Based on the foregoing, it is requested that the conviction be set aside and defendant granted a new trial.

Respectfully submitted,

SUMNER J. HATCH and
L. E. RICHARDSON

By L. E. Richardson

CERTIFICATE OF MAILING

This is to certify that I mailed two copies of the foregoing Brief to Vernon B. Romney, Attorney General of Utah, Utah State Capitol, Salt Lake City, Utah 84114, this 17th day of May, 1976.

L. E. Richardson