

1979

the State of Utah v. Walter Preston Boggess, Jr. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

THE STATE OF UTAH,

*

Plaintiff and Respondent,

*

vs.

*

Case No. 16232

WALTER PRESTON BOGGESS JR.,

*

Defendant and Appellant,

*

BRIEF OF APPELLANT

An appeal from a Judgment of the District Court of the
Fourth Judicial District, The Honorable J. Robert Bullock,
District Court Judge.

Attorney General's Office
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Salt Lake City, Utah 84114

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NATURE OF THE CASE

This appeal is taken from the decision of the Fourth Judicial District Court, J. Robert Bullock, Judge, sitting with a jury, on the 18th day of May, 1978 at Vernal, Utah.

Appellant thereafter obtained permission to file this appeal by writ of habeas corpus granted December 29, 1978 by Ernest Baldwin judge of the criminal division in the Third Judicial District Court, sitting on the law and motion bench.

DISPOSITION IN FOURTH DISTRICT COURT

Appellant was tried before the Court, sitting with a jury, on May 18, 1978. Following instructions, presentation of evidence and argument, the jury returned a verdict of guilty of the charge of manslaughter. The court accepted the verdict and sentenced the appellant to the indeterminate term of 5 years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the decision of the Fourth Judicial District Court reversed and the case remanded for retrial.

STATEMENT OF FACTS

Defendant was arrested on March 2, 1978 and charged with murder in the second degree, pursuant to UCA 76-5-203, following the death of his wife, Tammy Boggess, from a gunshot wound. An information was thereafter filed likewise charging defendant with murder in the second degree.

Defendant was assigned counsel and entered a plea of not guilty to the charge contained in the information.

Trial on the matter was held on May 18, 1978 before the honorable J. Robert Bullock sitting with a 6 man jury. At the outset, the Court issued certain instructions to the jury concerning the offense of second degree murder and manslaughter as defined in the Utah Code, (p 5, L. 18 to p 6, L. 18)

During the course of the trial Appellant's counsel met with counsel for the State and with Judge Bullock privately in chambers and made record of information which had come to him concerning the improper bias of one of the jurors. Counsel for Appellant then reserved his right to move for mistrial.

At the close of evidence, the court again instructed on murder in the second degree and manslaughter. The jury was sequestered and a short time later returned with a verdict of guilty of manslaughter.

No further action was then taken by counsel for appellant, nor was an appeal filed within 30 days, as required by law.

Appellant was thereafter sentenced to the indeterminate term of 5 years to life in the Utah State Prison.

On December 29, 1978 appellant's petition for Habeas Corpus in Third Judicial District Court was heard. The Petition was granted and the Court's Findings of Fact and Conclusions of Law were entered.

This appeal was thereupon commenced.

POINT I

FAILURE TO INSTRUCT THE JURY CONCERNING LESSER INCLUDED OFFENSES IS REVERSIBLE ERROR

A Defendant in a criminal case is entitled to instructions on all lesser included offenses which are supported by any substantial evidence. This principle is firmly established in the law of Utah.

A lesser included offense is one whose elements are all included in the greater offense charged. This definition is discussed in State v. Woolman, 84 Utah 23, 33 Pac. 2d. 640 (1934)

The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and if the greater offense includes all the legal and factual elements, it may safely be said that the greater includes the lesser, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the greater (emphasis added) 33P.2d at 645

Employing this test to the case at bar, it is clear that the greater offense includes all the legal and factual elements of the lesser. The offense of murder in the second degree necessarily includes all the elements of the lesser offense of negligent homicide. Negligent homicide is an element of the greater offense of murder in the second degree and is clearly a lesser included offense.

A test has been announced by the Court in State v. Lloyd, 568 P. 2d 357 (1977) and State v. Cornish, 568 P. 2d 360 (1977). In these cases the Court looked to the single criminal episode statute of the Utah Code, specifically, Section 76-1-403 (3), (1973) in finding that joyriding is an offense included in auto theft. This section provides:

A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

- (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
- (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
- (c) It is specifically designated by a statute as a lesser included offense.

Applying the principals of this test to the case at bar, it is clear that the offense of negligence homicide is a lesser included offense of murder in the second degree. The offense of negligence homicide falls within paragraph (a) above. It is established by proof of the same or less than all the facts required to establish the commission of the greater offense.

In State v. Dougherty, 550 P. 2d 175 (1976) the Utah Supreme Court discussed the situations where instructions on lesser included offenses are requested and when such instructions must be given as a matter of law. Citing Lisby v. State, 82 Nev. 183, 414 P. 2d 592 (1966) the Utah Court stated:

The court discussed three situations in which the problem of lesser included offenses are frequently encountered. First, where there is evidence which would support a finding of guilt of a lesser offense, or degree; the instruction is mandatory. Second, where the evidence would not support a finding of guilt in the commission of the lesser offense or degree. For example, the defendant denies any complicity in the crime charged, and thus lays no foundation for an intermediate verdict; or where the elements of the offenses differ, and some element essential to the lesser offense is either not proved or shown not to exist. This second situation renders an instruction on a lesser included offense erroneous, because it is not pertinent.

Third, is an intermediate situation. One where the elements of the greater offense include all the elements of the lesser offense; because, by its very nature, the greater offense could not have been committed without defendant having the intent in doing the acts, which constitute the lesser offense. In such a situation instructions on the lesser included offense may be given, because all elements of the lesser offense have been proved. However, such an instruction may properly be refused if the prosecution has met its burden of proof on the greater offense, and there is no evidence tending to reduce the greater offense. The court concluded by stating that if that be any evidence, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lesser included offense, the court must, if requested, give an appropriate instruction. 550 P.2d at 176.

Since the instruction on the lesser included offense either must have been given or was mandatory, pursuant to the authority quoted above, it was error for the trial court not to give it.

Error in failing to give a jury instruction becomes prejudicial if there is a "reasonable likelihood" that if the requested instruction had been given "it may have had some effect upon the verdict rendered" State v. Mitcheson, 560 P. 2d 1120 (Utah 1977). This standard of reasonable likelihood has been further explained in another context

in State v. Eaton, 569 P. 2d 1114 (Utah, 1977), where the Court stated,

Consistent with the nature of criminal proceedings and the protections accorded those accused of crime under our law, including the presumption of innocence and the burden of the state to prove the defendant's guilt beyond a reasonable doubt, we believe that an appeal, when there is a reasonable doubt as to whether the error below was prejudicial that doubt should be resolved in favor of the defendant. 569 P.2d.

This principle is also discussed in State v. Gillen 23 Utah 2d. 372, 463 Pac. 2d. 811 (1970) in which the defendant's counsel specifically requested an instruction on second degree manslaughter in the trial on an information charging homicide. The court there held that the defendant is entitled to have the jury instructed on the lesser included offense if there is any substantial evidence to justify it. The court referred to this principle as being generally accepted in Utah law, citing to State v. Johnson, 112 Utah 130, 185 Pac. 2d. 738 (1947), State v. Newton, 105 Utah 561, 144 Pac. 2d. 290 (1943) and State v. Ferguson, 74 Utah 263, 279 Pac. 55 (1929).

This is in accord with the law of other western jurisdictions which hold that, particularly in cases involving homicide, the Court must instruct on all lesser included offenses which are reasonably supported by the evidence. The holdings in these cases do not turn on the question of whether the defendant has or has not requested the instruction, but place the burden

upon the court. See State v. Booker, 200 Kan, 166, 434 Pac. 2d 80, (1968); Sanchez v. People, 172 Colorado 168, 470 Pac 2d. 857 (1970); State v. Ramos 108 A 36, 492 Pac 2d 697 (1972); State v. Ramirez, 116 A 259, 569 Pac 2d 201 (1977); State v. Olsen, 10 R. App 90, 459 Pac 2d. 445 (1968).

The fact that the jury in this case did return a verdict of manslaughter, having chosen the alternative lesser offense presented to them by the court raises a reasonable inference that the jury might have determined the defendant guilty of negligent homicide had that offense been presented to them for consideration. The Appellant is entitled to have this offense presented to the jury; it's exclusion was prejudicial and therefore warrants reversal of his conviction in this case.

The evidence shows that a gun in the hand of the defendant did in fact fire, injuring defendant's wife, Tammy Boggess and that Tammy Boggess later died as a result of that wound.

The question before the court and the jury was not whether or not these events occurred, but the state of mind of the defendant at the time of the occurrence.

Defendant was charged with criminal homicide in the second degree. The elements of that offense are as follows:

76-5-203. Murder in the second degree.-(1)
criminal homicide constitutes murder in the
second degree if the actor:

(a) Intentionally or knowingly caused the death of another or

(b) Intending to cause serious bodily injury to another, he commits an act clearly dangerous to human life that causes the death of another; or

(c) Acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another and thereby causes the death of another; or

(d) While in the commission, attempted commission, or immediate flight from the commission or attempted commission of aggravated robbery, robbery, rape, forcible sodomy, or aggravated sexual assault, aggravated arson, aggravated burglary, burglary, aggravated kidnapping, or kidnapping, causes the death of another person other than a party.

Manslaughter, on which the jury was also instructed, is defined:

Manslaughter.-(1) Criminal homicide constitutes manslaughter if the actor:

(a) Recklessly causes the death of another; or

(b) Causes the death of another under the influence of extreme mental disturbance for which there is a reasonable explanation or

(c) Causes the death of another under circumstances where the actor reasonably believes the circumstances provide a moral or legal justification or extenuation for his conduct although the conduct is not legally justifiable or excusable

under the existing circumstances.

Negligent homicide - (1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

The elements of these offense are substantially the same except in the expression of the state of mind of the offender. Reference to the definitions of the terms referring to state of mind of UCA 76-2-103 shows that criminal negligence differs from "recklessness." and both differ from "knowingly" only in degree.

The Utah Code defines "intentionally, or with intent or willfully"; knowingly, or with knowledge"; "recklessly, or maliciously"; and "criminal negligence or criminally negligent"

76-2-103 A person engages in conduct:

(1) Intentionally, or with intent to willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but continuously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances is viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result

will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

The facts presented to the jury in this case substantially support the elements, not only of the offenses of second degree homicide and manslaughter, but negligent homicide as well. Evidence of Appellant's intention at the time of the shooting was introduced by the victim's statements denying malicious intent (P 62 L5 to L 14); Appellant's testimony (P 55, L 2 to P 57, L 30 P 94 L 10 to line 26, P 97 L 24 to L 29 P 101, L 29 to P 102 L 14) indicates activities and a State of mind which a reasonable jury could have characterized as criminal negligence, as defined by Utah law.

Accordingly, it was error for the Court, with or without the request of counsel, to omit an instruction on negligent homicide. This omission was prejudicial to appellant in that it deprived a jury which was not convinced that appellant killed intentionally and knowingly, that being the element of second degree murder which differs from by exceeding the elements of manslaughter. "Criminal negligence" does not significantly differ from "recklessly" as used in the definition of the offense of manslaughter.

Appellant urges reversal and remand on this point.

II THE COURT'S FAILURE TO DECLARE A MISTRIAL CONSTITUTES REVERSIBLE ERROR

During the course of the trial, counsel for

appellant became apprised of the bias of one of the jurors. He notified the Court of his findings during a meeting with opposing counsel in the judge's chambers, but did not then or later request a mistrial. Defendant asserts that it was incumbent upon the court to declare a mistrial, based upon the information concerning this juror.

The State of Utah law on this point is established by two early cases:

In State v. Mickle, 25 Utah 719, 70 Pac. 2d. 857 (1902) a juror previous to trial made a statement to the effect "I think the defendants are guilty and they ought to be convicted any-way on general principles". This court in that case held that the previously expressed bias of a juror which was not admitted during *voire dire* required reversal of the defendant's conviction for grand larceny and remand for a new trial.

In State v. Morgan, 23, Ut. 212, 64 Pac. 2d. 356 (1901) this court reversed a homicide conviction based upon the pre-judgment of one juror which was with-held during *voire dire* and further stated that in a homicide case, where the verdict must be unanimous, the misconduct of one juror constitutes misconduct of the entire jury, requiring that the defendant be given the benefit of an impartial jury and new trial.

In the case at bar, as in the cases cited above, one of the jurors, Mr. Robert Wingar expressed a strong negative bias toward the defendant prior to trial and then withheld his opinion during the *voire dire*. This information was made available to the Court by counsel for defendant. (p 110 L 13 to P

113 L 23).

Defendant asserts that it was the affirmative duty of the Court to make further inquiry into this matter and to declare a mistrial in this case. Failure to do so should be deemed a reversible error.

III APPELLANT WAS DENIED EFFECTIVE REPRESENTATION, OF COUNSEL
AS REQUIRED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF
THE UNITED STATES

The sixth amendment to the United States Constitution provides that each defendant shall have the right to the assistance of counsel in his defense. The Supreme Court and this court have interpreted this phrase to mean the assistance of effective counsel. Anderson v. Turner, 27 Utah 2d. 182, 493 P2d. 1278 (1972).

In this case the defendant was denied effective representation by two grievous errors on the part of his counsel.

The first error is failure to require or otherwise discuss and acquaint the jury with the lesser included offense of negligent homicide...indeed, counsel requested of the jury that they bring in a verdict for the one lesser included offense of manslaughter, while entirely neglecting the possibility of negligent homicide throughout the proceedings.

Secondly, and perhaps most troublesome, is counsel's failure to move for mistrial, even though he was fully aware of the defect in the jury, having himself brought it to the attention of the Court.

Courts have avoided holding that counsel was ineffective, but in case discussing the issue have spoken as follows: In State v. Delaney, 351 Pac. 2d. 85, 221 Or. 620 (1960) on appeal from conviction for assault with intent to commit rape, the court stated that a new trial would be granted if the record reflects a prejudicial lack of attention and diligence on the part of such counsel. Similarly, in State v. Keller, 400 Pac. 2d. 370, 65 Was, 2d. 907, the court, while affirming the conviction, stated the principle that a new trial must be granted when incompetence or neglect of appointed counsel results in violation of constitutional rights by reducing trial to a farce.

While defendant does not assert that his trial in this case was a farce, counsel's failure to note the lessor included offense and especially to act on information concerning impropriety in the jury robbed appellant of effective representation and the right to a fair and impartial trial.

The duty of counsel in a criminal matter, and more particularly in a conviction for homicide, extends to perfection of an appeal, should that be the desire of the defendant. In this case, even though counsel for appellant was well aware of at least one ground for reversal, he failed to perfect an appeal or to contact the appellant concerning this matter after his conviction.

Counsel failure to file a timely appeal denies appellant of his opportunity to correct the errors existing at his trial. This denial of due process has been dealt with by the Supreme Court in Anders v. California, 386 U.S. 738, 18 L. Ed.

2d. 493, 87 S. Ct. 1396 (1967), holding that the constitutional right to counsel requires that on an indigent defendant's first appeal from his conviction, court appointed counsel must support the appeal to the best of his ability, and may withdraw only after filing briefs on behalf of the appellant and then only if the court agrees that the appeal is wholly frivolous. Counsel's failure to perfect an appeal in this case is submitted as further evidence of lack of interest and diligence in this case.

CONCLUSION

Appellant urges this court to reverse his conviction for manslaughter based upon one or more of the errors described herein.

Appellant was severely prejudiced by the trial court's failure to instruct on the lesser included offense of negligent homicide. The elements of negligent homicide were substantially supported by the evidence adduced. Substantial case law supports the proposition that this error requires remand (State v. Dougherty, supra, State v. Mitcheson, supra, State v. Gillian, supra

Further, Appellant was denied a fair trial in this case by the impropriety of one juror, which must be imputed to all of the jurors (State v. Morgan, supra) and by the failure of his counsel to remedy or act on these errors. particularly was much as counsel recognized the impropriety of the juror sitting in appellants case; counsel failed to act competently in Appellants behalf as required by ethical cannons 6 & 7.

Appellant submits that each of the errors is sufficient to require reversal; that the combination of errors renders them more potent, and the effect on the outcome of Appellant's case more prejudicial.

Respectfully Submitted

David Paul White