

1987

Utah v. William Silas Case : Petition for Writ of Certiorari

Utah Supreme Court

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870178
DOCKET NO. IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Petitioner, :
v. : Case No. 870178
WILLIAM SILAS CASE, :
Respondent. :

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

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MAY 21 1987

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QUESTIONS PRESENTED FOR REVIEW

The primary question presented for review is whether the decision of the court of appeals is in conflict with State v. Chapman, 655 P.2d 1119 (Utah 1982), which held, in pertinent part, that the trial court had not abused its discretion in admitting the preliminary hearing testimony of a key prosecution witness who did not appear for trial, even though the prosecution had not utilized the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings" (hereinafter "Uniform Act")¹ in its efforts to secure the witness's attendance. Integral to this question is the further question of whether the lower court's opinion is in conflict with State v. Brooks, 638 P.2d 537 (Utah 1981), and Ohio v. Roberts, 448 U.S. 56 (1980), which ruled that admission of an unavailable witness's preliminary hearing testimony does not violate a

¹ The Uniform Act is currently contained in UTAH CODE ANN. § 77-21-1 et seq. (1982).

defendant's right of confrontation under the state and federal constitutions.

The secondary question presented for review is whether the lower court incorrectly treated defendant's search and seizure issue in the context of remanding the case for retrial, when a proper application of Chapman would not require a retrial.

OPINION BELOW

The opinion of the court of appeals in State v. Case, 55 Utah Adv. Rep. 63, ___P.2d___ (Ct. App. 1987), appears as Appendix A to this petition. A copy of that court's order denying the State's petition for rehearing appears as Appendix B.

JURISDICTION

The lower court's opinion was filed on April 15, 1987 (Appendix A). On May 11, 1987, an order denying the State's petition for rehearing was issued (Appendix B). The State's petition for rehearing tolled the period in which this petition for certiorari had to be filed, R. Utah S. Ct. 45(c); therefore, the petition is timely filed. This Court has jurisdiction to review the decision of the court of appeals by a writ of certiorari under UTAH CODE ANN. § 78-2-2(5) (Supp. 1986).

PROVISIONS OF CONSTITUTIONS, STATUTES, AND RULES INVOLVED

1. U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the Assistance of counsel for his defence.

2. UTAH CONST. art. I, § 12:

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

3. UTAH CODE ANN. §§ 77-21-3 (1982):

Procedure to secure attendance of witness from without state. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. The certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered such sum as may be required by the laws of

the state in which the witness is found, not exceeding the sum of 20 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and \$30 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within the state a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If the witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

4. Utah R. Evid. 804(a)(5):

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant

. . .

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

5. Utah R. Evid. 804(b)(1):

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

Respondent, William Silas Case, was charged with aggravated assault, a third degree felony, under UTAH CODE ANN. § 76-5-103 (1978) (R. 5). After a jury trial, he was found guilty of that offense (R. 42). The court sentenced him to a term of zero to five years in the Utah State Prison (R. 43).

On direct appeal, the court of appeals reversed defendant's conviction and remanded the case for a new trial on the ground that defendant's constitutional right of confrontation had been violated when the trial court ruled that the prosecution's chief witness was unavailable for trial and then admitted that witness's preliminary hearing testimony. Case, 55 Utah Adv. Rep. at 64 (Appendix A). The State's petition for rehearing was denied without comment (Appendix B).

B. Facts Relevant to Issues Presented for Review

Because the testimony of the State's key witness, Suzanne McPerrson (the victim of defendant's aggravated assault), does not appear in the trial transcript (T. 31), or any other part of the appellate record,² the State is unable to set forth, by reference to the record, the essential facts of the crime of which defendant was convicted. However, given that defendant carries the burden on appeal to demonstrate that reversible (as opposed to harmless) error occurred, State v.

² The tape recording of McPerrson's preliminary hearing testimony was played at trial; however, that testimony has not been transcribed for appeal, nor has the recording (State's Exhibit 40) been made a part of the record on appeal.

Jones, 657 P.2d 1263, 1267 (Utah 1982), and that one of his assignments of error requires no detailed recitation of the facts, it is sufficient to state that this prosecution and conviction arose out of an incident that occurred at the Oquirrh Motel in Lakepoint, Utah on February 6, 1986, wherein a bloodied and battered McPerrson ran nude from a room that she occupied with defendant (T. 47-63).

In the trial court, the State presented the following evidence of its efforts to secure the attendance of McPerrson at trial. Sherry Brown, a legal secretary with the Tooele County Attorney's Office, personally served a subpoena on McPerrson for the preliminary hearing while McPerrson was in a local hospital shortly after the crime. After McPerrson had testified at the preliminary hearing, Brown verbally informed her of a tentative trial date, with the understanding that McPerrson would shortly thereafter give the county attorney's office an address to which a "reminder" subpoena could be sent. Subsequently, McPerrson contacted the county attorney, and a subpoena was sent to her in Mobile, Alabama. McPerrson acknowledged receipt of the subpoena four days after it was sent in a telephone conversation with Brown. During that conversation, Brown reviewed the date and location of the trial with McPerrson and received assurances from her that she would attend. In the following weeks before trial, Brown talked with McPerrson approximately eight times about the trial, each time receiving a commitment from McPerrson that she would attend voluntarily. It was not until the morning of trial that Brown learned from a police officer that McPerrson would not

be appearing. The officer had received a long distance phone call from McPerrson that morning, in which McPerrson indicated that she would not be at trial because "she was afraid of the defendant in the matter and . . . couldn't bring herself to come in" (T. 14-19, 21-24). Finally, the prosecutor did not utilize the Uniform Act in his efforts to secure McPerrson's attendance (T. 3).

ARGUMENT

POINT I

THE CONCLUSION OF THE COURT OF APPEALS THAT A PROSECUTION WITNESS'S PRELIMINARY HEARING TESTIMONY WAS ADMITTED AT TRIAL WITHOUT THE NECESSARY FINDING OF UNAVAILABILITY AND IN VIOLATION OF DEFENDANT'S RIGHT OF CONFRONTATION IS IN CONFLICT WITH DECISIONS OF THIS COURT AND THE UNITED STATES SUPREME COURT.

In the court of appeals, defendant argued that, because the prosecutor had not made reasonable efforts to secure Ms. McPerrson's attendance at trial, the trial court had erroneously ruled that she was unavailable as a witness for the purpose of admitting her preliminary hearing testimony pursuant to Utah R. Evid. 804(a)(5) and (b)(1). Br. of App. at 11-14.

Although the lower court acknowledged the efforts of the prosecutor, and even characterized them as "thorough and in good faith," it reversed defendant's conviction because (1) the prosecutor, by not utilizing the Uniform Act, failed to demonstrate McPerrson's unavailability, and (2) "[t]he use of an audio tape of prior testimony without corroboration deprived defendant of his right of confrontation under the 6th Amendment of the U.S. Constitution and Article I Section 12 of the Utah

State Constitution." Case, 55 Utah Adv. Rep. at 64. This two-pronged holding is in conflict with controlling authority from this Court and the United States Supreme Court.

In State v. Brooks, 638 P.2d 537 (Utah 1981), this Court clearly set forth the law applicable to the admission of an unavailable witness's preliminary hearing testimony at trial:

Defendant's right to confrontation is guaranteed by the Utah Constitution, Article I, Section 12, and by the Sixth Amendment to the United States Constitution.

In the context of federal constitutional law, the court in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), (hereinafter Roberts) outlined a two-pronged test to determine the admission of prior testimony in relationship to confrontation considerations. The first requirement is that the witness must be unavailable; the second requirement is that the testimony must bear sufficient indicia of reliability to permit its introduction at trial. Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 38 L.Ed.2d 293 (1972); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); Pointer v. Texas, 380 U.S. 400, 88 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895). See also State v. Mannion, 19 Utah 505, 57 P. 542 (1899).

A state may construe its own constitution more narrowly than the federal constitution even though the provisions involved may be similar. Nonetheless, the two-pronged test in Roberts appears to be a correct and reasonable standard to this Court.

In State v. Oniskor, 29 Utah 2d 395, 510 P.2d 929 (1973), we held that the testimony of an unavailable witness given at the preliminary hearing could be used at trial provided prosecutorial authorities have made a good faith effort to obtain his presence at trial. The rule of review enunciated in

Gallegos v. Turner, Utah, 526 P.2d 1128 (1974), is that we will not reverse the ruling of the trial judge that the efforts were made in good faith in the absence of a showing of clear abuse of discretion.

638 P.2d at 539. These standards apply regardless of whether the analysis proceeds under the state and federal constitutions or under Utah R. Evid. 804. Brooks, 638 P.2d at 541-42 (holding that constitutional analysis applied equally under former Utah R. Evid. 63(3), a rule comparable to current Rule 804(b)(1)). See generally 4 J. Weinstein & Berger, Weinstein's Evidence § 804(a)[1] at 47-56 (1985) (summarizing federal case law defining unavailability under Fed. R. Evid. 804(a)(5)).³

In holding that "the prosecutor did not make use of the 'reasonable means' required to meet the definition of 'unavailability,'" Case, 55 Utah Adv. Rep. at 64, the court of appeals neither stated nor applied the applicable standard of review, and made no effort to distinguish this case from State v. Chapman, 655 P.2d 1119 (Utah 1982), which appears to require a result different from the one reached below. Under Brooks, the trial court's determination of unavailability will not be reversed absent "a showing of clear abuse of discretion." 638 P.2d at 539 (emphasis added). When that standard is applied in

³ This Court has never construed Rule 804(a)(5); however, it has made clear that, in accordance with the intent of the advisory committee for Utah's new rules of evidence, it will "look[] to the interpretations of the federal rules by the federal courts to aid in interpreting the Utah rules." State v. Banner, 717 P.2d 1325, 1333-34 (Utah 1986) (citing State v. Gray, 717 P.2d 1313, 1317 (Utah 1986)). The Court has discussed Rule 804(b)(1) in only one case. See White Pine Ranches v. Osguthorpe, 731 P.2d 1076, 1078-79 (Utah 1986).

conjunction with the holding of Chapman, it is difficult to find any abuse of discretion in defendant's case, let alone a clear abuse of discretion. In Chapman, the Court, indicating that there was no inflexible requirement that the Uniform Act be utilized as a condition precedent to the use of prior testimony, held that the trial court did not abuse its discretion in ruling that an out-of-state witness was unavailable and that his preliminary hearing testimony was admissible when the witness had acknowledged receipt of a subpoena in the mail and the prosecutor had no reason to question his availability prior to seven days before trial. Specifically, the Court stated:

We find that the trial court did not err in determining that the second witness, Richard Scoville, was "unavailable." Upon receipt of the Utah subpoena, Scoville affixed his signature to the line which acknowledged his receipt of the subpoena and his intention to comply with it. When Scoville first contacted the county attorney on February 26 he said he would attend the trial. Because of these responses, the state had no reason to question Scoville's availability prior to seven days before trial. After learning late on February 26 that Scoville would not attend and failing in their attempts to contact Scoville's employer on February 26 the state had only five days to implement the Uniform Act. While it is possible to imagine more concerted efforts by the state to secure voluntary compliance, we hold on these facts that the court did not abuse its discretion in determining that the state acted in good faith in attempting to secure Scoville's attendance at trial.

655 P.2d at 1123-24. In comparison, the State's efforts in defendant's case were far more concerted than those at issue in Chapman, and the prosecutor had no reason to believe that McPerrson would not appear until the day of trial, as opposed to

the five days' notice received in Chapman. Although the court of appeals stated that it "believe[d] the permissive use of the Uniform Act should continue to be the norm in Utah," Case, 55 Utah Adv. Rep. at 64, its conclusion that McPerrson was not unavailable because the prosecutor failed, with extremely short notice, to implement the Uniform Act, effectively guts the holding of Chapman in favor of a most inflexible rule which requires use of the Uniform Act in nearly all cases. Cf. State v. Gray, 616 S.W.2d 102 (Mo. App. 1981) (cited in Chapman, 655 P.2d at 1123, as authority contrary to the rule adopted by this Court).

The lower court avoided the Chapman holding cited above by alluding to the following language in that case:

When, however, the state receives a clear message that the witness is aware of the noncompulsory effect of the subpoena and that the witness intends not to comply, for whatever reason, the state must either take additional steps to secure voluntary compliance, with appropriate assurances, or resort to the more compulsory avenues offered by the Uniform Act. Half-hearted last minute efforts, as here, to confirm a witness' intention not to comply are insufficient to demonstrate good faith and override the defendant's constitutional rights of confrontation at trial.

655 P.2d at 1123. It concluded that the prosecutor had "a clear message" that McPerrson would not appear because of her "lifestyle and nomadic habits," "the distance the victim would have to travel to appear," and "[h]er financial condition [which] evidenced a distinct lack of funds with which to travel." Case, 55 Utah Adv. Rep. at 64. It is not at all clear upon what record evidence the court based these conclusions. The State is unable

to find anything in the record to indicate that either finances or distance of travel were an obvious impediment to McPerrson's appearance at trial, or that the prosecutor should have known that they were.⁴ Furthermore, the only basis in the record for concluding that McPerrson had "nomadic habits" is defendant's testimony that she had indicated to him some difficulties with other truckers from whom she had received rides and defense counsel's statement prior to trial that the prosecution knew at the time of preliminary hearing that McPerrson had not had a permanent address for over eight years (T. 3-4, 147-49). Counsel's unsubstantiated statement concerning McPerrson's lack of a permanent address should not be evidence upon which a factual conclusion rests. See State v. Erwin, 101 Utah 365, 120 P.2d 285, 313 (1941) (remarks by counsel during opening statement to the jury are not evidence). And, to the extent that it may be inferred from defendant's testimony that McPerrson was hitchhiking with truckers as she traveled around the country, Case, Utah Adv. Rep. at 64, it cannot fairly be assumed from this limited evidence that McPerrson was a "career" hitchhiker or had such nomadic tendencies that she could not reasonably be trusted to appear voluntarily at trial. The extent or purpose of her travel was never established in the record below. In sum, the court appears to have arrived at conclusions of fact based on speculation about matters outside the trial court record--

⁴ Defendant did not argue this on appeal or at trial. Moreover, normally the prosecutor's office pays for the travel and lodging of an out-of-state witness. Indeed, § 77-21-3 requires that the witness be paid for travel and time expended.

something this Court has indicated an appellate court should not do. State v. Bingham, 684 P.2d 43, 46 (Utah 1984) (the Court cannot rule on matters outside the trial court record); State v. Sparks, 672 P.2d 92, 94 (Utah 1983).

The second prong of the lower court's holding, which identified a right of confrontation violation, Case, 55 Utah Adv. Rep. at 64, is perhaps more disturbing. On appeal, defendant raised no issue concerning either the propriety of using an audio tape of prior testimony or alleged undue reliance on the taped testimony by the jury because it may have taken the tape into the jury room and replayed it. He limited his argument to an attack on the trial court's ruling concerning unavailability. Br. of App. at 11-14. An appellate court generally will address only those issues presented by a defendant on appeal. See, e.g., State v. Cloud, 722 P.2d 750, 754 n. 3 (Utah 1986).

Nevertheless, without qualification and with no citations to supporting authority, the court of appeals stated:

The use of an audio tape of prior testimony without corroboration deprived defendant of his right of confrontation under the 6th Amendment of the U.S. Constitution and Article 1, Section 12 of the Utah State Constitution. There was nothing and no one to confront. If this tape was taken into the jury room and was played, there is an additional erroneous deprivation of the right of confrontation and an over reliance on the testimony by the jury.⁵

⁵ Again, there is nothing in the record to indicate that the tape was taken into the jury room and played; the court merely speculated that this may have occurred. One cannot discern from the record whether the jury even had the equipment necessary to play the tape.

Case, 55 Utah Adv. Rep. at 64. These rather broad statements of law, which appear to be a primary basis for the court's conclusion that the prosecutor should have utilized the Uniform Act, conflict directly with State v. Brooks and Ohio v. Roberts, 448 U.S. 56 (1980), which held that preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's right of confrontation under the state and federal constitutions. Neither Brooks nor Roberts prohibits the admission of an audio tape in lieu of a transcript, or excludes the prior testimony if uncorroborated.⁶ And, defendant did not argue, nor is there any indication in the record, that the preliminary hearing suffered from any confrontational defects. Finally, simply because the prior testimony constituted the primary evidence against defendant is of no consequence. That was the case in both Brooks and Roberts. See also California v. Green, 399 U.S. 149 (1970).

In effect, the lower court has created a new constitutional rule which is diametrically opposed to the one adopted by this Court and the United States Supreme Court. Although an intermediate court of appeals is certainly free to

⁶ The court's statement that the victim's testimony was uncorroborated appears to be incorrect. First, it is difficult to understand how the court could make such a determination without knowing the content of her testimony. (As noted in its opinion, her testimony was not transcribed for purposes of appeal. Case, 55 Utah Adv. Rep. at 64.) Furthermore, assuming that McPerrson's testimony established that defendant had assaulted her, the testimony of a number of prosecution witnesses about her physical condition immediately after the incident, as well as evidence of screams heard coming from defendant's motel room, would constitute corroborative evidence (T. 32-39, 47-53, 58-63, 102-06). See Brooks, 638 P.2d at 539.

criticize the rulings of the superior appellate court, see, e.g., Selby v. Department of Motor Vehicles, 168 Cal. Rptr. 36, 37-38 (Cal. App. 1980), in performing the primary "error-correcting" function in a two-tiered appellate system, it is not in a position to overrule superior authority, and it generally should refrain from performing its "law-declaring" function in cases of great moment. See State v. Grawien, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818 (Wis. App. 1985); UTAH CODE ANN. §78-2a-3(3) (Supp. 1986) (authorizing certification of issues to Supreme Court).

This issue is substantial and mandates intervention by this Court for several reasons. First, the lower court has ignored controlling authority relating to the applicable standard of review and rule of law. Second, its decision, if left unreviewed, would create unnecessary and unwelcome confusion on two important questions: (1) the scope of a defendant's constitutional right of confrontation; and (2) what efforts are required of the proponent of an unavailable witness's prior testimony to secure the attendance of that witness at trial in a criminal case. Third, the decision marks the first time an appellate court in Utah has specifically interpreted the relevant provisions of Utah R. Evid. 804, and that interpretation is at odds with this Court's construction of Rule 804's predecessor and the pertinent constitutional provisions. Finally, the apparent ease with which the court of appeals moved from the "error-correcting" arena into the "law-declaring" arena suggests that this Court needs to provide guidance on the role of an

intermediate appellate court in a two-tiered appellate system. Consistency in the appellate courts is particularly important to the criminal justice system, where the rights of victims, society, and defendants -- at stake in daily litigation in the trial courts -- demand clear rules of law.

POINT II

REVIEW OF THE LOWER COURT'S RESOLUTION OF DEFENDANT'S SEARCH AND SEIZURE ISSUE SHOULD BE GRANTED IN CONJUNCTION WITH REVIEW OF THE PRIOR TESTIMONY QUESTION.

Because this Court should review the lower court's ruling on the admissibility of the challenged preliminary hearing testimony, it should also review that court's resolution of defendant's search and seizure issue. Addressing the latter issue in terms of a remand for a new trial was not appropriate in light of controlling authority on the former issue -- authority that, if applied, would not require a retrial. The lower court should have analyzed the search question under the harmless error rule.

CONCLUSION

Based upon the foregoing arguments, the State's petition for a writ of certiorari should be granted.

Respectfully submitted this 21st day of May, 1987.

DAVID L. WILKINSON
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David B. Thompson
DAVID B. THOMPSON
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CERTIFICATE OF SERVICE

I hereby certify that four true and accurate copies of the foregoing Petition were mailed, postage prepaid, to Joseph C. Fratto, Jr., Attorney for Defendant, 431 South 300 East #101, Salt Lake City, Utah 84111, this 21st day of May, 1987.

David B. Thompson

APPENDICES

APPENDIX A

2. Although not raised in the briefs, the State pointed out at oral argument that since Dr. Palmer also testified that the baby died from brain swelling and that the swelling most likely resulted from a deliberate violent act, such as severe shaking, the jury's verdict of conviction can be sustained even if Defendant's argument as to the meaning of the statute is accepted. In view of the decision we reach, it is not necessary to consider this contention.

3. At oral argument, Defendant argued that "physical injury" and "serious physical injury" are, in effect, two totally self-standing and independent concepts. According to Defendant, "physical injury" means just what subsection 1(b) says it does and includes the more expansive concept of "impairment." By contrast, "serious physical injury" means just what it says and it does not include the concept of "impairment." We cannot agree. Even though the Legislature did not specifically state that the term "physical injury" as used in subsection 1(c) shall be defined in accordance with subsection 1(b), it would be absurd to look to Webster's for the definition of "physical injury" as used in subsection 1(c) where a specific definition of that very term is provided in the immediately preceding subsection of an integrated and carefully drawn statute. This is particularly true where the text introducing the definitions makes clear that the definitions are to be used throughout the entire statutory section.

4. Since we reject Defendant's interpretation of the statute, we necessarily find no error in permitting the doctor to testify that the overall impairment of the baby's physical condition was, in his opinion, life-threatening.

5. Defendant's boyfriend, James Chad Anderson, pleaded guilty to third degree felony child abuse and was sentenced to a prison term of not to exceed five years. The trial court recommended that the entire sentence be served.

Frank T. Mohlman for Defendant and Appellant

DAVIDSON, Judge:

Defendant was convicted of the crime of aggravated assault, a Felony of the Third Degree, in the District Court and was sentenced to confinement in the Utah State Prison for the statutory period. Defendant appeals claiming the trial court erred in admitting evidence obtained in a warrantless and unreasonable search and seizure. He also claims it was error to allow the preliminary hearing testimony of the absent victim to be used in trial. We reverse and remand.

William Silas Case, a long haul trucker, was proceeding east on Interstate Route 80 during the early morning hours of February 6, 1986. Severe weather conditions caused him to exit the road at a truck stop in Lakepoint, Tooele County, Utah. Case subsequently took a room at the Oquirrh Motor Inn in Lakepoint under the name Bill Freeman.

At approximately 9:30 p.m. on the same day, the motel's resident manager was telephoned by another guest who reported what sounded like screaming coming from the room registered to Case. The manager contacted defendant by telephone and the latter reported he had a "crazy woman" in his room and that the manager should contact the police. Shortly after the conversation with defendant, the victim, Suzanne McPerrson, appeared in the manager's apartment nude and bleeding from cuts. The manager and her husband rendered first aid to the victim. During this time period the police were notified.

Four members of the Tooele County Sheriff's Office responded to the report. Defendant met the officers on the second floor balcony outside of his room. After ascertaining that defendant wasn't armed and without asking his permission nor obtaining a search warrant, the officers entered his room and obtained evidence.

The trial record indicates the victim had a practice of hitchhiking with truckers as she traveled around the country. Upon her arrival at the truck stop she contacted defendant by CB radio and he gave her shelter in his motel room. Alcoholic beverages were purchased and consumed by both victim and defendant. After a struggle, the victim ran from defendant's room into the manager's apartment. She subsequently told one of the officers that defendant had tried to kill her. Defendant claimed the victim was attempting suicide which he tried to prevent.

Ms. McPerrson was personally served a subpoena while in the hospital. She appeared and gave testimony at the preliminary hearing. At the conclusion of that proceeding, the victim was given a tentative trial date by the criminal legal secretary for the Tooele County

Cite as
55 Utah Adv. Rep. 63

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Respondent,

v.

William Silas CASE,
Defendant and Appellant.

Before Judges Davidson, Greenwood and Jackson.

No. 860201-CA
FILED: April 15, 1987

THIRD DISTRICT COURT
Hon. John A. Rokich

ATTORNEYS:

David L. Wilkinson, David B. Thompson for
Plaintiff and Respondent

Attorney. The victim left an address and telephone number in Mobile, Alabama. She was mailed a subpoena at the Mobile, Alabama address which was acknowledged by telephone. Between the preliminary hearing and the date set for trial, the victim contacted the secretary approximately eight times. On each occasion she indicated a willingness to voluntarily appear at trial. On the morning of the trial, the victim telephoned and stated she would not be present. Because of the victim's absence the trial court allowed the cassette recording of her preliminary hearing testimony to be played before the jury, over the objection of defense counsel. The conviction and this appeal ensued.

The trial record does not contain any information concerning the content of the victim's testimony at the preliminary hearing other than it was played to the jury. The cassette was admitted into evidence, likely taken into the jury room during deliberation and may have been played there as well as during the trial.

The crux of this case can be found in Utah R. Evid. 804 (b)(1), which permits the recorded testimony of an unavailable witness to be used if it was given at another hearing of the same or different proceeding and if the opposing party had an opportunity to develop the testimony through cross examination. Rule 804 (a)(5) defines "unavailability" in part as the witness being absent and "the proponent of his statement has been unable to procure his attendance by process or other reasonable means."

Although the Tooele County Attorney's Office personally served the victim with a subpoena to insure her attendance at the preliminary hearing, that office did not do so for the trial. It is not denied that the prosecutor attempted to keep close contact with Ms. McPerrson while she was in Alabama during the period between the preliminary hearing and the trial. A subpoena was sent by mail which was acknowledged by the victim. The numerous telephone calls all caused Tooele County to believe this critical witness would appear. But, the prosecutor's mailing of a subpoena was not effective service. At his disposal was the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Utah Code Ann. §77-21-1 et seq. (1982). This was not used.

The Utah Supreme Court, in *State v. Chapman*, 655 P.2d 1119, 1122 (Utah 1982), stated that use of the Uniform Act is permissive. However, that Court also indicated a preference for the Uniform Act if the state "receives a clear message" that the out-of-state witness won't comply with the mailed subpoena and appropriate assurances to secure voluntary compliance might not be effective. Here, the state's efforts to ensure the victim's

attendance at the trial would appear to be thorough and in good faith. The mailed subpoena and the numerous telephone contacts indicate a concern on the part of the prosecutor that the witness in fact be present.

Defendant could only be found guilty through the victim's testimony that he stabbed her and that she was not in the process of trying to end her life. The right of confrontation is most critical in a situation such as this. Two conflicting stories are told with little or no corroborative evidence available. The jury must decide whom to believe. It is vitally important that the witness be present and subject to cross examination in the presence of the jury. The use of an audio tape of prior testimony without corroboration deprived defendant of his right of confrontation under the 6th Amendment of the U. S. Constitution and Article 1 Section 12 of the Utah State Constitution. There was nothing and no one to confront. If this tape was taken into the jury room and was played, there is an additional erroneous deprivation of the right of confrontation and an over reliance on the testimony by the jury. While we believe the permissive use of the Uniform Act should continue to be the norm in Utah, this is a situation in which the prosecution should have used it. Ms. McPerrson's lifestyle and nomadic habits make it clear that she possessed the potential to disappear or refuse to appear for trial. The prosecutor was aware of the distance the victim would have to travel to be present. Her financial condition evidenced a distinct lack of funds with which to travel. On balance, the prosecutor should have been wary of this witness despite her telephone assurances. The use of the Uniform Act would have been the proper procedure to apply and, without its use, the prosecutor did not make use of the "reasonable means" required to meet the definition of "unavailability."

We need not analyze the second prong of the test which determines whether the testimony of an absent witness may be admitted. We have already determined the victim was not "unavailable", therefore, whether such testimony bore sufficient indicia of reliability is not addressed. *State v. Brooks*, 638 P.2d 537 (Utah 1981).

Because we remand for a new trial, the issue of the propriety of using evidence taken from the motel room is examined. The State, in its appellate brief, concedes there is some question whether the evidence obtained in the warrantless search of defendant's room should have been suppressed pursuant to Utah R. Crim. P. 12(g). We agree that there were no exigent circumstances present that necessitated an entry into the motel room without a search warrant. *State v. Harris*, 671 P.2d 175, 179 (Utah 1983). The trial record shows Case was on the balcony outside of the room when the

police arrived. He was unarmed and cooperative. In this situation the officers should have attempted to get defendant's permission to enter, or failing that, obtained a search warrant. We hold that the Motion to Suppress evidence taken from the motel room should have been granted.

We reverse and remand to the District Court for a new trial on the matter.

Richard C. Davidson, Judge

WE CONCUR:

Norman H. Jackson, Judge

Pamela T. Greenwood, Judge

Cite as
55 Utah Adv. Rep. 65

**IN THE
UTAH COURT OF APPEALS**

Cynthia DAHL, widow of Steven C. Dahl,
deceased,
Plaintiff,

v.

The INDUSTRIAL COMMISSION of the
State of Utah, Revlon Service, Inc. and/or
Liberty Mutual and/or Default Indemnity
Fund,
Defendants.

Before Judges Davidson, Greenwood and
Jackson.

No. 860215-CA
FILED: April 15, 1987

INDUSTRIAL COMMISSION

ATTORNEYS:

Frank J. Gustin, Kent M. Kasting for
Plaintiff.

Michael E. Dyer, Stephenie A. Mallory,
Revlon Service, Inc., Susan Puxton for
Defendants.

OPINION

DAVIDSON, Judge:

Plaintiff wife Cynthia Dahl appeals from an Industrial Commission denial of her Motion for Review of an Order dismissing her claim for dependent's death benefits. We reverse.

Plaintiff and the deceased, Steven Bradley Dahl, were married in Colorado on October 22, 1978. Plaintiff was employed by Frontier Airlines and the deceased was unemployed. Several months after the marriage, the deceased took employment with Revlon Service, Inc. and continued in that employment until his death. During September of 1979, the couple moved to Utah so deceased could

manage Revlon's local district. Plaintiff was able to base out of Salt Lake City and continued with the airline. Upon arrival in Utah, the couple purchased home in Sandy. The financing arrangements required a monthly mortgage payment of approximately \$778.00. The deceased suffered a heart attack in February of 1984. This appeared to trigger a decline in the marriage relationship. As a result, plaintiff departed the family home during November of 1984 and returned to Colorado. Plaintiff and the deceased maintained telephone contact and would meet when the latter had occasion to be in Denver. During January of 1985, the deceased filed Complaint for divorce. In March of 1985, plaintiff's attorney prepared a Verified Motion for Order to Show Cause seeking temporary monthly support of \$750.00. This motion was never heard because the parties agreed that the deceased would temporarily maintain the mortgage on the family home and make payments on the current debt obligations of the couple. Subsequently, both parties prepared Property Settlement and Separation Agreements. That of the deceased was signed by plaintiff on July 23, 1985, and by the deceased and his attorney on July 25, 1985. In the signed Agreement both parties waived alimony, the deceased was to make the mortgage payments on the home and pay plaintiff for her share of the equity therein, the parties were to equally share certain specific debt obligations, and the various personal property was distributed. The stipulation was filed with the District Court after Mr. Dahl's death which he met in a commercial aircraft accident on August 2, 1985, while returning from a business trip. The deceased's attorney had filed a Certification of Readiness for Trial in the District Court, but the matter had not been heard at the time of Steven Dahl's death.

The hearing record reveals the parties' joint income to have been \$57,624.00 in 1983 and \$59,286.00 in 1984. In 1984, plaintiff's gross income was approximately \$20,000.00 which reflects the two months she took off because of the deceased's heart attack in February of that year. During the initial three months following plaintiff's return to Denver, she sent the deceased \$200.00 per month to assist in the expenses of the home and the joint debt obligations. These payments were discontinued when the deceased filed for divorce. At the time the deceased agreed to assume the joint debt obligations, these amounted to approximately \$7,000.00, exclusive of the mortgage.

Utah Code Ann. §35-1-73 (1986) requires death benefits to be paid to one or more dependents of the decedent. Section 35-1-71(2) (1986) contains the presumption that a surviving spouse living with the decedent at the time of death is wholly dependent on the decedent. However, the same subsection states, "[i]n all other cases, the question of

APPENDIX B

UTAH COURT OF APPEALS

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Regular May Term, 1987

May 11, 1987

State of Utah,
Plaintiff and Respondent,
v.
William Silas Case,
Defendant and Appellant.

REMITTITUR

Court of Appeals No. 860201-CA
Dist. Ct. #86,009

Upon consideration of the petition for rehearing heretofore
filed herein, and the arguments of counsel thereupon had, it is
ordered that the rehearing be, and the same is, denied.

Issued: May 11, 1987

Record: 2 Vols