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Utah v. David Andrew Moosman : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO. 870251 IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	*	
Plaintiff-Respondent,	*	Case No. 870251
v.	*	Argument Priority
		Classification 1
DAVID ANDREW MOOSMAN,	*	
Defendant-Appellant.	*	

REPLY BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF A CAPITAL FELONY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. SECTION 76-5-202(1)(F) (1978); AND COMMUNICATIONS FRAUD, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. SECTION 76-10-1801(1)(e) (1978); AND MAKING A FALSE OR FRAUDULENT INSURANCE CLAIM, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. SECTIONS 76-6-412(1)(a)(i) AND 76-6-521 (1978), IN THE FIRST JUDICIAL DISTRICT COURT, IN AND FOR CACHE COUNTY, STATE OF UTAH, BEFORE THE HONORABLE VENNY CHRISTOFFERSEN, PRESIDING.

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REPLY BRIEF OF APPELLANT

The Respondent's brief and the concurrent effort to "supplement" the record do not demonstrate that the Appellant knowingly and voluntarily waived his right to a jury trial with an understanding of the nature and effect of that waiver. The Respondent endeavors to supplement the record pursuant to Rule 11(h) of the Rules of the Supreme Court. However, the trial court procedure with respect to the "waiver" falls short of the constitutional standard imposed upon trial courts to determine whether the waiver was knowingly, voluntarily and intelligently entered.

Despite efforts of the Respondent to sustain the sufficiency of the evidence on appeal, the Appellant renews his argument that the evidence falls woefully short of the standard required to support and sustain a conviction for murder in the first degree. Furthermore, Appellant contends that it follows that if the

evidence will not support a conviction for murder in the first degree it likewise will not support convictions for communications fraud or making a false or fraudulent insurance claim because the elements of each of the latter two offenses rely upon the homicide as providing the essential element constituting the fraud.

ARGUMENT

POINT I

THE RESPONDENT'S BRIEF DOES NOT DEMONSTRATE THAT THE APPELLANT VOLUNTARILY WAIVED HIS RIGHT TO A JURY TRIAL OR HIS DECISION CONCERNING A WAIVER, IF ANY, WAS MADE WITH A KNOWLEDGE OF HIS RIGHT TO SUCH A JURY TRIAL. FURTHERMORE, THE RESPONDENT'S EFFORTS TO SUPPLEMENT THE RECORD BY CREATING A NEW RECORD IS PROCEDURALLY DEFECTIVE AND APPELLANT'S SUBSTANTIVE RIGHTS AND DUE PROCESS WERE DENIED.

In his Appellant's Brief Appellant argues that Section 77-35-17(c), Utah Code Annotated 1953, as amended, provides that a Defendant charged with a felony is entitled to a jury trial absent a showing that the Defendant waived a jury in open court with the approval of the court and with the consent of the prosecution. Apparently conceding that the record was silent as to a waiver by the Appellant of his right to a jury trial in the trial below, the Respondent sought to remand the appeal to the trial court for the purpose of supplementing the record. (R. 134).

Upon remand the Appellant objected to efforts of the Respondent to create a new record because the certified court

reporter who had recorded the trial and ancillary proceedings in the trial court had already certified the record to the Utah Supreme Court and there was no record of any proceedings where Appellant had waived his constitutional right to a jury trial nor were there any proceedings advising the Appellant of his rights relative to such a waiver. (R. 136). Appellant further objected to the Respondent's efforts to create a record where none existed because counsel for the Respondent had advised the Utah Supreme Court at the hearing on the motion to remand that no effort was being made to create a record. The Respondent was merely seeking to determine whether or not the certified court reporter had reported and transcribed all matters of record. (R. 134).

Affidavits were filed by trial counsel, both for the Appellant and for the Respondent, and the Appellant also filed an affidavit relating to the procedures followed by the trial court on the waiver issue. Appellant's trial counsel verified that he met with the trial judge and the prosecutor on the morning of the commencement of the trial. (R. 137, 144). The Appellant was not present during counsel's meeting with the trial judge or thereafter, and the trial court was simply notified that Appellant intended to waive his jury trial. Trial defense counsel then verifies in two separate affidavits that no further inquiry was had by the trial court and the trial proceeded without a jury. (R. 137, 144).

By affidavit the prosecutor confirms that the meeting with the trial judge did not occur on the record or in open court, but was held in chambers. (R. 141). However, the prosecutor states that the Appellant was present at the conference in chambers. Notably the prosecutor does not allege or affirm that any inquiry was made by the trial judge as to the basis for the Appellant's waiver or his knowledge and understanding of his right to a jury trial. The prosecutor simply states that "the Court addressed Mr. Moosman on whether he intended to waive his right to a jury. The defendant said he did. The Court then adjourned to the courtroom to commence trial." (R. 141).

The Appellant filed his own affidavit stating that he was not present at any conference or hearing, in open court or otherwise, with the trial judge or prosecutor where his waiver of a jury trial was discussed. Furthermore, he affirmed that no inquiry was made as to whether he understood his constitutional or statutory right to a jury trial. (R. 143).

Despite the weight of the evidence, including the prosecutor's statement that the trial judge merely asked the Appellant if he intended to waive the jury and nothing more, the trial judge issued written findings in the form of a memorandum decision that the Appellant had been informed of his right to a jury trial by the trial judge and the effect of his waiver. (R. 146). Thereupon, the matter was remanded to the Supreme Court

without the opportunity of the Appellant to take exception to the findings.

The Appellant submits that the procedure employed by the Respondent and the trial court in creating a new record do not conform to the intent of Rule 11(h) of the Rules of the Supreme Court. The Appellant further submits that the procedures employed by the Respondent have not found prior favor with the Utah Supreme Court or the Utah Court of Appeals.

In Hansen vs. Stewart, 761 P.2d 14 (Utah 1988), where a discussion had been held in chambers between trial counsel and the trial judge during the trial of a case in the First Judicial District out of the presence of the court reporter and objections had there been made to certain jury instructions and the exact nature objection had not been made clear, the Utah Supreme Court on appeal refused to allow the supplementation of the trial record. There, as in the instant case, the parties could not agree on what transpired in chambers, and the Supreme Court stated that it was incumbent upon the aggrieved party to preserve the record. They did not, and the court would not consider their challenge to the jury instructions. (Id. at 17).

In the instant case, it was incumbent upon the prosecutor to preserve the record below. Where the parties cannot agree upon the proceedings in chambers, even as to who was present and the substance of the conference, this court should not permit the supplementation of the record below.

See also Birch vs. Birch, 771 P.2d 1114 (Utah App. 1989), in which the Utah Court of Appeals held that relief from a judgment would not be granted based upon an alleged statement made by the trial judge during in camera discussions between the husband and wife in a divorce case where no record was made of the discussion. In Birch the court stated that " . . . a record should be made of all proceedings of courts of record" and that "that precept applies to conferences in chambers as well as more formal proceedings." (Id. at 1116). Appellant urges this court to disallow the supplementation sought by the Respondent. As stated earlier, neither trial counsel, the Appellant nor the trial judge can agree upon what transpired in chambers without a court reporter as it relates to the issue of a knowing or voluntary waiver by the Appellant of his right to jury trial. Even the prosecutor's affidavit and proffer under Rule 11(h) of the Rules of the Supreme Court seems to contradict the findings of the trial judge on the question of whether the trial judge advised the Appellant of his constitutional and statutory rights. Because neither the counsel for the parties nor the judge can agree on the substance of the meeting in chambers, this court should disallow the trial judge's findings. See Hansen, Supra.

The Appellant in his brief previously filed with the court has cited a number of cases supportive of a finding that the trial court erred in the procedures it employed in proceeding to try the Appellant without a jury where the Appellant did not waive his

right to a jury in open court and did not do so knowingly or voluntarily. Each rebuts the Respondent's argument that the waiver was knowingly and voluntarily made.

POINT II

DESPITE THE RESPONDENT'S ARGUMENT TO THE CONTRARY THE EVIDENCE DOES NOT SUPPORT A FINDING OF FIRST DEGREE MURDER AND A FORTIORI DOES NOT SUPPORT FINDINGS OF GUILTY TO COMMUNICATIONS FRAUD AND FALSE OR FRAUDULENT INSURANCE CLAIM.

In his brief previously filed with the court the Appellant has cited this court to its decision in State vs. Walker, 743 P.2d 191 (Utah 1987), and to the Utah Court of Appeals decision, State vs. Wright, 744 P.2d 315 (Utah App. 1987), both of which enunciate the rule that verdicts from bench trials in criminal cases are subject to review under the "clearly erroneous" standard specified in Rule 52(a) of the Utah Rules of Civil Procedure.

The Appellant argued in his brief originally filed with this court that a careful scrutiny of the record in the instant case discloses a number of erroneous findings by the trial court which are not supported by the evidence introduced at trial. The Respondent takes exception to the Appellant's argument and the Appellant's citation of the court to the trial court's findings. Nevertheless, the Appellant submits that the evidence does not support the trier of fact's findings.

At page 1647 of the transcript, the trial judge ostensibly refers to the testimony of Trooper Robert Dahle, a Utah Highway Patrolman who reconstructed the accident as an expert witness for prosecution. (See Trooper Dahle's testimony at Tr. pp 661-766). There are sharp contradictions, however, in Trooper Dahle's testimony and the testimony of Dr. Reynold K. Watkins, a professor of engineering and former head of the engineering department at Utah State University in Logan who testified in behalf of the Appellant and reconstructed the accident. (See Dr. Watkins testimony at Tr. 1146-1212).

The trial judge found that the abrupt turning of the car by the Appellant constituted an "intentional part on the part of the driver of running the car off the road with the passenger in it with an escape route for himself" at a point which the trial judge described as " . . . one of the most dangerous parts in Logan Canyon, at a point conveniently just past the guardrail, at a point where an exit could be made if you do it quickly enough just as the car turns, in which you might let go of the steering wheel just as it existed (sic) off the shoulder of the road . . . " (Tr. pg 1647).

Neither expert witness testified as to facts which would support the trial judge's finding. Trooper Dahle did state that the movement of the vehicle off of the roadway would have been a left to right movement. (Tr. 675). He even states that the movement would have been caused by an abrupt movement of the

steering wheel from left to right causing a sideslip, and although such a movement could be consistent with an intentional act, Trooper Dahle testified that the movement could have been accidental resulting from dozing or falling asleep at the wheel. (Tr. 677, 730). Trooper Dahle, however, cannot place the vehicle on a specific portion of the roadway at the time the turn is begun, and acknowledges that the turn could have been less acute depending upon where the vehicle was on the roadway when the left to right movement began. (Tr. 720). Dr. Watkins upon recross-examination by the prosecution testified that the scuff mark to which Trooper Dahle had testified "could have been caused by someone falling asleep, a driver who was falling asleep." (Tr. 1209).

Except for and obscure reference by Trooper Dahle to the curve just east of the accident site being the sharpest curve in the canyon (Tr. 686-87), the transcript of the proceedings is silent with respect to evidence supporting the trial court's finding that this area of the Logan Canyon is one of the most dangerous parts in the canyon. There simply was no testimony presented by either the prosecution or the defense to support this "fact". Neither was there testimony that the fall down the embankment was at a point conveniently past the guardrail, although there was testimony that there have been changes of the road conditions, including the adding of a guardrail. (Tr. 1201).

The facts are that the accident occurred during hours of darkness on a roadway which was not illuminated except by the headlights of the appellant's truck. The experts did not agree on the speed of the Appellant's vehicle. Trooper Dahle placed the speed at a "high side or . . . maximum side of 27 miles per hour to 22 miles per hour on the low side." (Tr. 673). Dr. Watkins placed the speed at 28 to 30 miles per hour at the time the vehicle left the roadway. (Tr. 1162). The trial court found the slower speed to be the speed of the Appellant's vehicle and found that speed, 22 and 27 miles per hour, to be significant. (Tr. 1646). Irrespective of the speed of the speed of the Moosman vehicle, either the Watkins speed or the Dahle speed, it was the opinion of the expert witnesses that the appellant would have left the vehicle at the same rate of speed as the vehicle from which he left. The appellant submits that based upon the evidence presented at trial there is no basis for the court to have found that the appellant calculated his exit from the vehicle to coincide with his being at a location "conveniently beyond the guardrail" where the appellant could jump at the least risk to himself. (Tr. pp 1647, 1650-510)

Such a finding is a strained interpretation of the evidence. The expert witnesses produced by both the prosecution and the defense agreed that the defendant's reaction time and the physics of the accident would have prevented the appellant from opening the truck door and jumping out before the truck left the pavement.

Furthermore, the darkness of the canyon and the speed of the vehicle when control was lost mitigate against a finding that the appellant jumped clear of the out of control truck into an area predetermined by the appellant to have provided himself a safe escape.

The trial court places great weight upon the testimony of the state medical examiner in concluding that Mrs. Moosman's wounds were caused by having been struck by a blunt instrument and not by the accident itself or the action of a body rolling over in the stream on the rocks. (Tr. 1648-1650) The appellant submits, however, that Dr. Sweeney did not have sufficient contact with the Mrs. Moosman during the autopsy examination to have formed an opinion as to cause of death. In fact, Dr. Sweeney testified that Mrs. Moosman died from drowning. (Tr. 1021-1022).

Another "fact" relied upon by the trial court to sustain the conviction was the physical appearance of the Defendant as described by Dr. Bishop contrasted with the Appellants own testimony. (Tr. 1644).

Dr. Bishop, the emergency room physician who attended to the Appellant on the morning of the accident at approximately one a.m., described the Appellant as being "covered with dust or dirt from head to toe . . . lightly covered and not mudcaked." (Tr. 494G-494H). The trial judge found that testimony to be "inconsistent with the Defendant's testimony that he had been wading up and down the river to get out and finding a way to get

out, that he'd come up to chest level in the water, which would make all of his clothes wet." (Tr. 1644).

In so finding, the trial totally ignores the testimony of the Appellant. The accident occurred at approximately 8:30 p.m. (Tr. 671, 899-900). At approximately 1:00 p.m. the Appellant saw Dr. Bishop. (Tr. 494G). During the intervening period the Appellant climbed from the highway down to the river to provide assistance to his wife. (See Respondent's Brief, Statement of Facts, pp. 4-5). It is not unreasonable to assume that water from the river which would have caused his clothing to get wet would dry by normal evaporation. Similarly, dirt which would have accumulated on his clothing would dry and become somewhat dusty.

The trial judge stated that the Appellant's demeanor and reactions were sufficient to arouse Bishop's suspicions and cause him to report his concerns to the authorities (Tr. 1644-45), when in fact it was not the Defendant's demeanor or reactions that prompted the report, but a telephone call received by Bishop from a third party, one Dr. Graves who had previously employed Mrs. Moosman. (Tr. 496-97). Dr. Bishop later testified as to a visit he made to the accident scene and offered testimony concerning the soils at the scene and compared those soils with the dirt on Defendant's clothing. (Tr. 498-98). However, there was no scientific basis for the comparison. Dr. Bishop had no expertise.

Finally, the Respondent quotes Terry Carlsen, a witness for the prosecution, who testified that the Appellant had told Carlsen

on several different occasions in the months prior to Mrs. Moosman's death that he might kill her so that it would appear to be either an accident or the act of some other person. (Tr. 29-33). Carlsen claimed that the Appellant had told him that he (Appellant) had insurance on Mrs. Moosman's life and that would provide him with money to purchase property he wanted. (Tr. 23-24). Carlsen also testified that Appellant took out a term life insurance policy on Mrs. Moosman's life and a whole life policy on his own life in January 1985 each worth \$100,000.00. (Tr. 125, 136).

Despite the fact that the Respondent apparently places credence in Carlsen's testimony, the trial court expressed his reservations about Carlsen's credibility. (Tr. 1643). The court expresses his concern as to Carlsen's truthfulness and states there is not much weight to be given to his testimony. Id.

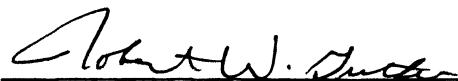
CONCLUSION

Section 77-35-17(c) of the Utah Code is specific as to the requirements for a waiver of a jury trial in felony matters. Despite efforts of the Respondent to supplement the record and create a record supporting its contention that the Appellant waived the jury trial with a knowledge and understanding of such a waiver, the record does not support such a finding. The procedures employed by the trial court were defective on the issue of waiver, and the Supreme Court should disallow the attempts to create a new record. Similarly, it should find that there was not

a proper waiver and the case should be reversed because of the defect in protecting the record and the Appellant's rights.

In the absence of a jury, the trial court proceeded to hear evidence and found the appellant guilty of each of the counts alleged in the information. However, the appellant submits that the evidence upon which the trial court based its finding of guilt was insufficient to support the conviction on any of the three counts. The appellant contends that constitutionally impaneled jury would have viewed the evidence differently than the trial court sitting without a jury and that the evidence heard by the trial judge sitting without a jury fails to establish clearly or convincingly that the Appellant is guilty of the crimes charged.

RESPECTFULLY SUBMITTED this 8th day of February, 1990.



Robert W. Gutke
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered four (4) true and correct copies of the above and foregoing Reply Brief of Appellant to counsel for the Respondent, R. Paul Van Dam, Attorney General, and Sandra L. Sjogren, Assistant Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 8th day of February, 1990.

