1979

State of Utah v. Roger anderson and Thomas E. Brackenbury : Respondent's Brief In Opposition To Petition For Rehearing

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

ROGER ANDERSON and
THOMAS E. BRACKENBURY,

Defendants-Appellants.

Case No. 16371

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR REHEARING

APPEAL FROM THE JUDGMENT OF THE
COURT OF THE FOURTH JUDICIAL DISTRICT
AND FOR WASATCH COUNTY, STATE OF UTAH
HONORABLE J. ROBERT BULLOCK

ROBERT B. HANSEN
Attorney General

EARL B. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah

Attorneys for Respondent

S. REX LEWIS

HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

Attorneys for Appellants

FILED

AUG

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS
(Continued)

STATUTES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

- - - - - - - - - - - - - - - -

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

Case No. 16372

ROGER ANDERSON and THOMAS E. BRACKENBURY,

Defendants-Appellants.

- - - - - - - - - - - - - - - -

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR REHEARING

- - - - - - - - - - - - - - - -

INTRODUCTORY STATEMENT

Respondent agrees with appellant Anderson's statement of the facts contained in the introduction of his brief on rehearing excluding the final paragraph of said introduction at page 2 of his brief.

POINT I

ADMISSION OF THE SWORN AFFIDAVIT OF A WITNESS NOT PRESENT AT THE PRELIMINARY HEARING WAS HARMLESS ERROR.

At the appellant's preliminary hearing, the State submitted as evidence the sworn affidavit of Ray Applegate, a witness residing in Oklahoma. The court admitted this

evidence under the provisions of Utah Code Ann. § 77-15-19 (1953), as amended which allows the admission of hearsay evidence "if the Court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing . . . "

This court found that admission of the hearsay evidence was error since it "would seriously curtail the appellant's ability to present an affirmative defense at the preliminary hearing by denying him the protections provided by the confrontation of witnesses against him." (Majority opinion, p.11). However, this court concluded that any error was harmless since the remaining evidence was sufficient to show probable cause to bind the appellant over for trial. (Majority opinion, p.12).

Respondent submits that this court's finding that any error in admitting the affidavit was harmless should be affirmed for the following reasons:

A

ANY ERROR IN ADMITTING THE AFFIDAVIT WAS HARMLESS SINCE THERE WAS A SUFFICIENT SHOWING OF PROBABLE CAUSE WITHOUT THE EVIDENCE CONTAINED IN THE AFFIDAVIT.

The purpose of a preliminary hearing is to establish probable cause to bind over the accused for trial. Thus, the

State's burden at the hearing is "to convince a committing magistrate that the crime charged has been committed and that there is sufficient cause to believe the defendant committed it." Seibold v. Turner, 20 Utah 2d 165, 435 P.2d 289, 290-1 (1967). Recognizing the limited purpose of the preliminary hearing, this court noted that "the probable cause showing must establish a prima facie case against the defendant from which the trier of fact could conclude the defendant was guilty of the offense charged." (Majority opinion p.6). In order to establish a prima facie case, the State must present evidence on each statutory element of the offense charged. State v. Romero, 554 P.2d 216, 217 (Utah 1976).

The appellant was charged with witness tampering under the provisions of Utah Code Ann. § 76-8-508 (1953), as amended. This section reads, in part:

> A person is guilty of a felony of the third degree if:
>
> (1) Believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a person to:
>
> (a) Testify or inform falsely. . .

The respondent submits that all statutory elements of the crime of witness tampering were established by prima facie evidence at the preliminary hearing. First, the

testimony presented at the preliminary hearing showed that the appellant believed an official proceeding or investigation was pending. Irvine J. Curtis, a former police officer for Soldier Summit, stated that he arrested Jim Garner at the request of appellant (Preliminary Hearing Transcript, p.37). Furthermore, appellant's position as Chief of Police of Soldier Summit would necessarily make him aware of any proceedings being instituted. The seconde element of the offense, attempting to induce or cause another person to testify falsely, is also established by the Curtis testimony. Curtis recounted two conversations with appellant and Tom Brackenbury in which they discussed the method used to obtain a statement from Ray Applegate to the effect that Garner had sold him liquor over the bar. (Preliminary Hearing Transcript, p. 38-39). The testimony concerning the first of these conversations reads, in relevant part:

> . . . He said, "I got a statement of him [Garner] selling alcohol over the bar," and I said, "How did you get that?" He said, "Well, I got it from Applegate, a truck driver, a drunk truck driver." He made the statement that he slapped him around real good, bragging about the fact that he had slapped him around to get the statement. . . (Preliminary Hearing Transcript p.38).

This testimony clearly established that the appellant attempted to obtain and succeeded in obtaining statements from Ray Applegate

through force. The final element of the crime is the falsity of the statements obtained from the witness. Evidence of falsity is shown by a comparison of the testimony of Jim Garner at the preliminary hearing as to what happened in the J & M Saloon on May 28, 1978 and the statement of Ray Applegate concerning the events of the same evening. (States Exhibit #1). Garner testified that Applegate did not purchase liquor from him (Preliminary Hearing Transcript p.49) nor did he purchase liquor from his wife for fifty cents a shot. (Preliminary Hearing Transcript pp. 50, 53). However, in the statement made by Applegate and witnessed by the appellant, Justice of the Peace Tom Brackenbury and Mayor George Schade, Applegate claims to have purchased alcohol from Garner and his wife at fifty cents a shot. Respondent submits that the testimony of these witnesses in conjunction with the false statements made by Applegate was sufficient to establish a prima facie case of witness tampering and establish sufficient cause to believe appellant committed the offense charged.

The appellant argues that the false statements made by Applegate cannot be considered in determining probable cause since the foundation for admission of these statements was the hearsay affidavit determined to be inadmissible by this court. Respondent contends that the appellant should

not be allowed to raise this objection for the first time in his petition for rehearing. The admission of these documents was not specifically objected to when they were offered at the preliminary hearing nor at any time since. It is a well-established principle that failure to raise a timely objection constitutes a waiver and estops a party from raising the objection for the first time on appeal. Sanders v. Cassity, 586 P.2d 423 (Utah 1978).

The respondent asserts that the evidence presented at the preliminary hearing was sufficient, notwithstanding the exclusion of the hearsay evidence, to fulfill the State's burden of showing probable cause. Respondent further claims that since the state fulfilled its burden at the preliminary hearing, no prejudicial error resulted from admission of the hearsay evidence.

B

THE ADMISSION OF THE AFFIDAVIT WAS HARMLESS ERROR, SINCE THERE WAS NO REASONABLE LIKELIHOOD THAT THE RESULT WOULD HAVE BEEN DIFFERENT IF THIS EVIDENCE HAD BEEN EXCLUDED.

The standard of review for prejudicial error established by Utah case law is a determination whether there is a reasonable likelihood that the result would have been different in the absence of error. A concise statement of this principle appeared in State v. Eaton, 569 P.2d 1114

(Utah 1977) where this court stated:

> . . . the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantial adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not be regarded as harmless; and conversely, if the error is such that it is clear beyond a reasonable doubt that it was harmless in that the result would have been the same, then the error should not be deemed prejudicial . . .

569 P.2d at 1116. See also, State v. Kazda, 540 P.2d 949 (Utah 1975); State v. Howard, 544 P.2d 466 (Utah 1975).

Any error in admitting the affidavit of Ray Applegate in lieu of his personal testimony at the preliminary hearing was harmless under this test since there is no likelihood of a different result in absence of the error. First, sufficient cause to bind the appellant over for trial was shown by evidence not contained in the affidavit. Second, if the affidavit had not been admitted, probable cause would have been established by the personal testimony of the witness. Accordingly, the court made provisions at the preliminary hearing that, should the affidavit be determined to be inadmissible, the proceeding would be continued until Applegate could testify in person. (Preliminary Hearing Transcript p.17). In absence of such a provision, the State could have refiled charges if exclusion of the affidavit

resulted in a determination that probable cause was not shown. Therefore, respondent submits that there is no reasonable likelihood of a different result in absence of error, since if the affidavit had not been admitted, the State would have made arrangements, at considerable expense, to have Applegate present at the preliminary hearing.

The appellant further contends that since he was not able to cross-examine the witness at the preliminary hearing, he was denied discovery opportunities which hindered his ability to prepare a meaningful defense. (Appellant's Brief, p.6). Respondent wishes to point out that this argument must be placed in the proper perspective. Recognizing the right of the accused to confront witnesses at the preliminary hearing does not create a right to discovery at the preliminary hearing. See, State v. Prevost, 188 Ariz. 100, 574 P.2d 1319 (1977); Rex v. Sullivan, 575 P.2d 408 (Colo. 1978); McDonald v. Dist. Court In and For Fourth Judicial District, 576 P.2d 169 (Colo. 1978); Robbins v. United States, 476 F.2d 26 (10th Cir. 1973). The discovery opportunity afforded the appellant at the preliminary hearing is in issue only as it relates to appellant's right to a fair trial, and the majority opinion does not support an independent right to discovery at the preliminary hearing. (Majority opinion p.11). On the contrary, the opinion

recognizes that discovery opportunities are "ancillary benefits" of the preliminary proceeding. (Majority opinion p.11). Thus, Justice Maughn clearly delineated the scope of the right of confrontation:

> . . . recognition of the right of confrontation at the preliminary examination does not change the character of that proceeding. It must still retain its preliminary nature and is not to be considered a full trial on the merits. The prosecution is not required to introduce its entire case at the hearing but, rather, need only introduce that quantum of evidence necessary to surmount their burden of proving probable cause. The recognition of the right of confrontation at the preliminary hearing merely demands the prosecution's use of hearsay evidence at the hearing may not circumvent the defendant's substantive rights to a fair hearing and fair trial, by denying the defendant an opportunity to cross-examine the witnesses who offer testimony at the hearing. (Majority opinion, p.12).

The respondent asserts that no "right to discovery" was denied appellant by introduction of the sworn affidavit at the hearing. The opportunity for discovery is merely a benefit incidental to the limited right of confrontation in the preliminary hearing. The State sustained its only burden at the hearing by presenting sufficient evidence in addition to the affidavit to establish probable cause to bind the appellant over for trial. Furthermore, every effort was

made to ensure that the fact Ray Applegate did not personally testify would have only a minimal effect on the defendant. Accordingly, the magistrate accepted the State's motion to admit the hearsay evidence pursuant to Utah Code Ann. § 77-15-1 (1953), as amended, with the understanding that if the motion were denied, and the hearsay not admitted, the preliminary hearing would be continued until the witness could be present. (Preliminary Hearing Transcript, p.17). In addition, the Court made arrangements with the prosecutor on the record to have Applegate available one day prior to trial. (Preliminary Hearing Transcript, p.19). The appellant's ability to prepare a meaningful defense was not hindered by the admission of this hearsay evidence to the extent that his right to a fair trial was affected. Thus, respondent submits that there is no likelihood that, in absence of any error in admitting this evidence, the result of the preliminary hearing or trial would have been any different.

Appellant cites the cases of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed 2d 705 (1967) and State v. Scandrett, 24 Utah 2d 202, 468 P.2d 639 (1970) in support of the contention that before a constitutional error can be held harmless, it must be proven to be harmless beyond a reasonable doubt. Respondent submits that these cases do not assert a standard for determining error any more stringent

than the "reasonable likelihood of a different result" test well established in the Utah case law discussed supra. Chapman treated the effect of highly prejudicial comments by opposing counsel in the presence of the jury concerning the accused's failure to testify. The appellant creates the impression that the Court in that case placed the burden of proving an error to be non-prejudicial upon the State when, in fact, the Supreme Court merely held that ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. Respondent submits that finding an error harmless beyond a reasonable doubt and concluding that there is no reasonable likelihood that, in the absence of error, the result would be different are converse statements of the same standard. Accordingly, this court has often expressed the standard in the alternative, as in the following language from State v. Howard, 544 P.2d 466 (Utah 1975):

> . . . if upon looking at the whole evidence, it appears beyond a reasonable doubt that there is no substantial likelihood that the verdict would have been different in the absence of the error, it should be disregarded. But the reverse proposition is also true: that if there is a reasonable likelihood that in the absence of the error, there would have been a different result, the error should be regarded as prejudicial. (Emphasis added).

554 P.2d at 469. See also State v. Eaton, supra.

The Scandrett case, similarly, merely re-states the standard for reversible error established in Utah case law and does not place a burden upon the State to show each and every error to be harmless beyond a reasonable doubt. This Court in Scandrett rejected the view that any violation of a constitutional right is prejudicial per se, concluding that although "there is a presumption that such error is prejudicial," "it can be overcome when the court is convinced beyond a reasonable doubt that it had no such prejudicial effect upon the proceedings." (Emphasis added.) 468 P.2d at 643. Respondent points out that the other cases cited by appellant as support its depiction of the test for harmless error also re-state the "reasonable likelihood" test. Respondent has already shown that any error in the present case is harmless under this standard since there is no reasonable likelihood that, had the hearsay evidence been excluded, the result at the hearing or the trial would have been any different and, conversely, it is clear beyond a reasonable doubt that the error could have no prejudicial effect upon the appellant's right to a fair trial.

POINT II

THE COURT SHOULD RECONSIDER ITS DETERMINATION THAT THE ADMISSION OF HEARSAY EVIDENCE AT THE PRELIMINARY HEARING CONSTITUTED ERROR.

Respondent respectfully urges this court to reconsider its conclusion on appeal that the introduction of hearsay evidence at the preliminary hearing was constitutional error. Respondent submits that it was unnecessary to implicate the constitutionality of Utah Code Ann. § 77-15-19 or to hold that an accused has a constitutional right to confront every material witness who is the source of evidence offered at the preliminary hearing.

The United States Constitution does not give the accused a right to a preliminary hearing. See United States ex rel Kassin v. Mulligan, 295 U.S. 396, 53 S.Ct. 781, 79 L.Ed. 1501 (1935); Beck v. Washington, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962). However, the Supreme Court has held certain Sixth Amendment rights must be guaranteed to an accused before trial at critical stages in the process of criminal prosecution. Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 845, 43 L.Ed.2d 54 (1975); Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1969). The Supreme Court "has identified as 'critical stages' those pretrial procedures that would impair defense on the merits if the accused is

required to proceed without counsel." Gerstein v. Pugh, supra, 420 U.S. at 122. Hence, the Fourth Amendment determination of probable cause to detain an individual, the situation in Gerstein, was not a critical stage requiring assistance of counsel, while the determination of probable cause to bind an accused over for trial, the situation in Coleman, was a critical stage of the proceeding requiring assistance of counsel. Although both cases involved a determination of "probable cause," the procedural safeguards differ. Myers v. Commonwealth, 363 Mass. 843, 298 N.E.2d 819, 823, 824 (1973).

These Supreme Court cases rest upon an analysis of the various stages of the criminal proceeding to determine when Sixth Amendment rights must be protected against possible prejudice. However, the Supreme Court has always made an effort to balance the accused's interest against the State's interest at each stage of the process. Gerstein v. Pugh, cf. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) ("[I]t is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." 400 U.S. at 481).

The Supreme Court has yet to hold that the Sixth Amendment right of confrontation is absolutely applicable to any criminal proceeding other than the actual trial.

"The right to confrontation is basically a trial right." Barber v. Page, 390 U.S. 719, 725 (1968). Thus far, the Supreme Court has determined that the right to effective assistance of counsel, the right to confront and cross-examine witnesses testifying at the hearing and the right of the defense to call its own witnesses are sufficient to protect the accused's right to a fair trial in critical pre-trial proceedings.

It is only at the trial stage, where accused's guilt or innocence is determined, that the Court has granted the accused the right to confront all witnesses presenting evidence. As the Supreme Court observed in Berger v. California, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 500 (1969), one of the objectives of the right to confrontation at trial is to guarantee that the ultimate fact finder who determines guilt or innocence has an adequate opportunity to assess the credibility of witnesses. This is echoed by other courts, eg., Haggard v. State, 475 S.W.2d 186, 187 (Tenn. 1971), "The 'confrontation' guaranteed by the United States Constitution is confrontation at trial. [Absence of the accused when a statement is made] is immaterial on a confrontation question so long as the [witness] can be cross-examined on the witness stand at trial." Where an accused can confront and cross-examine a witness at trial, "there is

no Sixth Amendment requirement that [the accused] also be allowed to confront [the witness] at a preliminary hearing prior to trial." United States v. Harris, 458 F.2d 670, 677 (5th Cir. 1972), cert. denied 409 U.S. 888, 93 S.Ct. 195, 34 L.Ed.2d 145 (1972).

The purpose of the preliminary hearing is to determine whether there is "probable cause" to bind the accused over for trial. Thus, the function of a preliminary hearing is similar to that of a grand jury proceeding. Utah Code Ann. § 77-18-1 et seq., and Utah Code Ann. § 77-19-1 et seq. Yet an accused at a grand jury proceeding has no right even to be present (unless called as a witness), Johnson v. Superior Court of San Joaquin County, 539 P.2d 792 (Calif. 1975), and no right to cross-examine or confront witnesses against him. People v. Encinas, 3 Cal. Rptr. 624, 186 C.A.2d 12 (1960); see State v. Salazar, 469 P.2d 157 (N.M. 1970). Utah Code Ann. § 77-19-3 provides that a witness testifying before a grand jury has the right to counsel and the right not to incriminate himself, but the statute does not provide for confrontation and cross-examination of witnesses.

At the preliminary hearing the accused has the same rights regarding counsel and self-incrimination. However, the accused has additional rights to be present when a witne

testifies and to cross-examine the witness, Utah Code Ann. § 77-15-10; to present his own witnesses, Utah Code Ann. § 77-15-11; supoenaed at his request, Utah Code Ann. § 77-15-11; and to require exclusion of persons from the proceeding, unless their presence is required by statute, Utah Code Ann. § 77-15-13. An additional safeguard inherent in the nature of the preliminary hearing is the requirement that the hearing take place before a magistrate rather than a jury of lay persons.

The accused's rights are further protected by the fact that the preliminary hearing is governed by the rules of evidence for criminal cases. Utah Code Ann. § 77-15-19(2). The only exception to the evidence rules is that hearsay may be admitted pursuant to Utah Code Ann. § 77-15-19. However, this statute provides that hearsay may be used at the preliminary hearing only in the following circumstances:

> (2) . . . if the court determines that it would impose an unreasonable burden on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness or party furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained. When hearsay evidence is admitted, the court, in determining the existence of sufficient cause, shall consider:
>
> (a) The extent to which the hearsay quality of the evidence affects the weight it should

be given, and

(b) The likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary examination.

The use of hearsay at the preliminary hearing is thus severe limited, requiring the magistrate to make several threshold determinations before admitting the evidence.

As this court noted, "Only when the specific safeguard is necessary to effectuate the protection of a substantive right held by the accused will its application to the specific criminal proceeding be mandated." (Majority opinion, p.5). Respondent submits that this Court's holding requiring confrontation of material witnesses presenting evidence at a preliminary hearing is not necessary to protect the accused's right to a fair trial. An accused's rights and interests are sufficiently protected by the assistance of counsel and the procedural safeguards in the preliminary hearing as noted above. The accused is not prevented from confronting witnesses if hearsay evidence is admitted since the accused himself may supeona the witness pursuant to Utah Code Ann. § 77-15-8. Furthermore, if the witness is not present at the preliminary hearing, the accused has the right to confront the witness at trial before the jury.

Since the primary purpose of a preliminary hearing is to determine if there is probable cause to bind the accused

over for trial, respondent contends that Utah Code Ann. § 77-15-19 is well drafted and should not be limited in its application by requiring confrontation of all material witnesses. The statute authorizes the use of hearsay only if production of the primary source of evidence would be an unreasonable burden on a party or a witness. The court is also required to make several other threshold determinations, as noted above, before admitting the hearsay. The use of hearsay evidence in these limited circumstances does not infringe upon an accused's right to a fair trial. The safeguards already existing in the criminal process are sufficient to protect this right without requiring confrontation of all witnesses at the preliminary hearing.

POINT III

THIS COURT SHOULD AFFIRM ITS FINDINGS THAT APPELLANTS OTHER ARGUMENTS IN HIS INITIAL BRIEF ON APPEAL ARE WITHOUT MERIT.

This court stated in the majority opinion that after consideration of appellant's other points on appeal, these points were found to be without merit. Respondent submits that this court's initial determination was correct and should not be disturbed. Respondent hereby incorporates by reference the arguments in opposition to appellant's contentions presented in respondent's initial brief on appeal.

CONCLUSION

Respondent submits that the recent decision by this court in State v. Anderson and Brackenbury, No. 16372, filed May 29, 1980, was correct and that a rehearing is not merited. Respondent prays that the present petition for rehearing be denied.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent