

1987

Utah v. Steven Ray James : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO. **870306** IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
Plaintiff-Respondent.	*	Case No. 870306
vs.	*	
STEVEN RAY JAMES,	*	Priority 1
Defendant-Appellant.	*	

REPLY BRIEF OF APPELLANT

Interlocutory appeal from pre-trial orders in a First Degree Murder, Capital Homicide, matter filed in the First Judicial District Court for Cache County, the Honorable VeNoy Christoffersen presiding.

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
Plaintiff-Respondent.	*	Case No. 870306
vs.	*	
STEVEN RAY JAMES,	*	Priority 1
Defendant-Appellant.	*	

JURISDICTION AND NATURE OF THE CASE

This is an interlocutory appeal from pretrial orders in a capital homicide case filed in the First District Court for Cache County, State of Utah. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. Sec. 77-35-26(2)(c) (1953, as amended).

STATEMENT OF FACTS

The statement of facts is set forth in Appellant's Brief and is not restated at this time.

SUMMARY OF ARGUMENT

1. Evidence of Defendant's California conviction of false imprisonment which would be inadmissible for impeachment purposes pursuant to Rule 609(b) of the Utah Rules of Evidence should also be inadmissible as an aggravating circumstance charged under Utah Code Ann. Sec. 76-5-202(1)(h) (1953, as amended). See Utah R. Evid. 609(b).

2. Defendant is entitled to a change of venue because of the conduct of the State in releasing information to the news

media which was designed to prejudice the community against the Defendant. The magnitude and nature of the pre-trial publicity, together with the prejudicial reports themselves and the emotional involvement of the community itself, require that venue be transferred from Cache County.

3. The issue of the denial of a survey of potential jurors is intimately related to the issue of venue and should be considered.

ARGUMENT

POINT I

THE AGGRAVATING CIRCUMSTANCE CHARGED UNDER UTAH CODE ANN. SEC. 76-5-202(1)(h) IS UNCONSTITUTIONAL AND WILL DENY DEFENDANT HIS RIGHT TO A FAIR TRIAL.

The State in the Respondent's brief ignores the proscription of State v. Banner, 717 P.2d 1325 (Utah 1986) which considered the admissibility of a witness' prior conviction for purposes of impeachment. Admittedly, Banner examined the admissibility of a prior conviction for purposes of impeachment. Nevertheless, the Appellant submits that the logic of Banner applies with equal force where the prior conviction is offered as to the merits of the case. This is particularly true where Banner would preclude the admission of Appellant's California conviction. The Defendant submits that the California conviction which the State arguably seeks to introduce as an aggravating circumstance in the capital homicide prosecution would be inadmissible on any grounds other than arguably as an aggravating circumstance to enhance a homicide conviction.

Rule 609(b) of the Utah Rules of Evidence renders the California conviction inadmissible because more than ten years have elapsed since the date of the California conviction. Similarly, Rules 403, 404 and 405 of the Utah Rules of Evidence specifically exclude the admission of the California conviction.

POINT II

THE CONDUCT OF THE STATE, IN RELEASING TO THE NEWS MEDIA INFORMATION DESIGNED TO PREJUDICE THE COMMUNITY AGAINST THE DEFENDANT, WHEN CONSIDERED TOGETHER WITH THE PREJUDICIAL REPORTS THEMSELVES, AND IN LIGHT OF THE EMOTIONAL INVOLVEMENT OF THE COMMUNITY IN DEFENDANT'S SITUATION, ENTITLE THE DEFENDANT TO A CHANGE OF VENUE.

The test proposed by the State for determining whether a motion for a change of venue should have been granted, namely that Defendant show that the prejudicial material actually prejudiced the jury that is eventually selected to hear the case, should not be applied in this case where there has been prejudicial publicity that has been disseminated in the community, exacerbated by state complicity, the test should be whether there is a reasonable likelihood that jury prejudice will prevent a fair trial.

The cases cited by the State in support of the harsher rule all involve situations where there was no showing of biased news coverage and little or no abuses committed by state officers and officials in generating the coverage. This Court, in State v. Pierre, 572 P.2d 1338 (Utah 1977), stated:

Defendant nowhere asserts that the news reports were biased, that the prosecution leaked items to the press, that there were editorial comments demanding conviction to

assuage public outrage, or that defendant was otherwise the subject of a trial by the news media. Moreover, there were not the abuses committed by state officers and officials which so characterize Sheppard, Estes and Rideau, all supra. In short, this is not one of those exceptional cases where pretrial publicity exacerbated by State complicity encouraged the jurors to form such strong preconceived views of the defendant's guilt as to be considered inherently prejudicial against him.

at p. 1349.

Likewise, the case of Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962), quoted in State v. Wood, 648 P.2d 71, 39 (Utah 1982), and cited by the state in support of the more restrictive rule, involved reported remarks by the trial judge, accompanied by "innocuous commenting."

During the course of that hearing, the judge in giving reasons against any further delay in going to trial said:

"If the charges or the allegations made by the Government in this indictment are true, it means that every person who has ever paid for a prescription drug during the period which is within the statute of limitations has a treble-damage anti-trust action."

These remarks, accompanied by innocuous commentary, were carried by four Bay Area newspapers in editions which appeared immediately after the hearing. The articles were not remotely inflammatory and one undertook to challenge the court's views on the question of private suits.

Northern California Pharmaceutical Ass'n at page 383.

The case of Codianna v. Morris, 660 P.2d 1101 (Utah 1983) cited by the state, apparently involved a couple of newspaper articles. The court observed:

Significantly, neither the examples of newspaper publicity attached to the affidavit nor anything else in the record supports the charge of actual prejudice from news reporting.

at p. 1111. There was no allegation or evidence of improper conduct by state officials.

The test proposed by the state should be followed only if the evidence is insufficient to support a motion for the change of venue under the first test - whether there is a reasonable likelihood that jury prejudice will prevent a fair trial. This two step process appears to have been followed in the recent case of State v. Bishop, 75 Utah Adv. Rep. 9 (1988) where the Court, referring back to State v. Pierre, stated:

After reviewing the record, we hold without reservation that the publicity and attendant circumstances in this case did not amount to "one of those exceptional cases where pretrial publicity exacerbated by State complicity encouraged the jurors to form such strong preconceived views of the defendant's guilt as to be considered inherently prejudicial against him." State v. Pierre, at 1349.

at page 19. The court's language regarding "strong preconceived ideas" and "inherently prejudicial" appears to essentially follow the constitutional test of Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) of whether there is a reasonable likelihood that jury prejudice will prevent a fair trial, with the additional recognition that the State's conduct in generating adverse pretrial publicity is going to be a significant factor.

The Bishop opinion, having found that the evidence did not satisfy the first test, then went on to the second, of

determining whether there was actual prejudice by pretrial publicity.

Because we hold that pretrial publicity and community sentiment did not inevitably lead to an unfair trial, defendant may prevail on his point only if he demonstrates that the trial was not fundamentally fair. We begin with the proposition that whether a motion for a change of venue should be granted rests within the sound discretion of the trial court. The standard used to determine if an abuse of discretion has resulted is whether the defendant has had "a panel of impartial, 'indifferent' jurors! . . . Thus, defendant has the burden of demonstrating the existence of actual prejudice on his appeal.

at p. 18.

The Defendant asserts that his is one of those cases where, looking at the "totality of the circumstances" as required by Pierre, at page 1350, and paying particular attention to the role of state officials in generating prejudicial publicity, the publicity did encourage jurors to form such strong preconceived views of the defendant's guilt as to be considered inherently prejudicial against him.

The Respondent makes no answer to the inexcusable behavior of the law enforcement officials in providing the following to the news media (Cites in Brief of Appellant):

1. That the victim's mother had taken and passed a polygraph test with "flying colors" but the Defendant had twice refused to take one;
2. That he had become uncooperative with the police;
3. That he was refusing to answer questions about possible new leads and becoming hostile;

4. That police want answers from Defendant;
5. That the police were suspicious of the Defendant;
6. That the police asked Defendant "point blank" to confess to the crime;
7. That he was always their key suspect;
8. That he threatened to kill one of the detectives;
9. That he had a criminal record including a California kidnaping where he abducted a woman at knifepoint;
10. That he had "possible involvement in a California child abuse case where the infant in that case reportedly sustained severe injuries;"
11. That he had an "extensive criminal record" including "convictions for previous violent offenses;"
12. That there was "confirmation from California officials that James fled the state while on parole;
13. The evils complained of in this case are the same that were addressed in the Discipline Corner of the Utah Bar Letter of March, 1988. Trial attorneys, particularly in the area of criminal prosecution or defense were referred to Rule 3.6 of the Rules of Professional Conduct and its predecessor DR 7-107 of the Code of Professional Responsibility. See Model Rules of Professional Conduct Rule 3.6 (1983) and Model Code of Professional Responsibility DR 7-107. While there is no evidence that the County Attorney himself or any of the attorneys in his office were was providing this information to the news media, and the content and context indicate the information

was emanating from the police investigators, these rules should not be permitted to be subverted because of lax supervision of law enforcement officials during the investigation and prosecution of criminal charges. DR 7-107, in effect during the time of the complained of activity, read as follows:

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial, or disposition of without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(2) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

As is readily apparent, all the reported information complained of was in violation of these standards contained in the Code of Professional Responsibility and is clearly of a nature which would encourage jurors to form such strong preconceived views of the Defendants' guilt as to be considered inherently prejudicial. Whether such conduct would be inherently prejudicial in a large metropolitan community such as Salt Lake County might be debatable. But law enforcement officials' injection of this information into the tight-knit homogeneous community of Logan where the whole town was taking the baby's disappearance very personally with extensive participation in the search is designed for and can have only one purpose and effect, encouraging the community, including potential jurors to form strong preconceived ideas of the Defendant's guilt.

POINT III

THE ISSUE OF THE DENIAL OF A SURVEY OF POTENTIAL JURORS IS INTIMATELY RELATED TO THE ISSUE OF VENUE AND SHOULD BE CONSIDERED.

The Defendant agrees with the State that the Petition for Interlocutory Appeal did not specifically raise this issue.

However, because it is intimately related to the issue of venue, it should be considered.

A formal motion was filed and was ruled on in court on June 18, 1987. An order denying the motion was signed on November 6, 1987 and attached to the docketing statement. A copy is attached as Exhibit 1. Thereafter, at the request of the county attorney, another hearing was held in which the court indicated that because the matter was on appeal, he wasn't sure he had authority to sign the appeal. However, counsel knows of no written order entered rescinding the order of November 6, 1987.

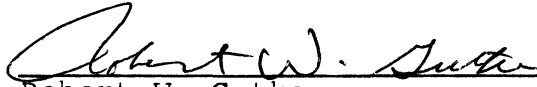
CONCLUSION

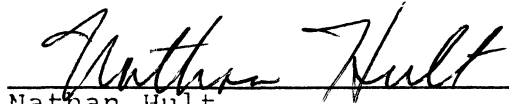
The admission of a 15 year old conviction which is totally unrelated to the conduct for which the Defendant stands accused will result in prejudice against the Defendant. The conviction would be inadmissible under any of the rules of evidence promulgated by this Court. To permit the jury to hear proof concerning a California felony conviction will divert the jury's attention from the homicide charge and will likely result in Defendant's being found guilty without regard to the weight of evidence in the homicide case.

The pervasive adverse publicity associated with the disappearance of the James infant, the resultant efforts to locate the kidnaped child, the investigation which culminated in the arrest of the Defendant, and the pre-trial publicity attendant to this case have created an atmosphere in Cache County, Utah, which make it virtually impossible to impanel a fair and impartial jury in Cache County. The District Court

should have granted the Defendant's motion to transfer the trial, and likewise, should have granted his motion to survey potential jurors as to their attitudes in an effort to determine bias and prejudice in advance of having to select from a potential venire or to adjudicate the motion for change of trial.

DATED this 15th day of June, 1988.


Robert W. Gutke
Attorney for Defendant/Appellant


Nathan Hult
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing Reply Brief of Appellant to counsel for the Plaintiff/Respondent, David L. Wilkinson, Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, postage prepaid, this 15th day of June, 1988.



EXHIBIT 1

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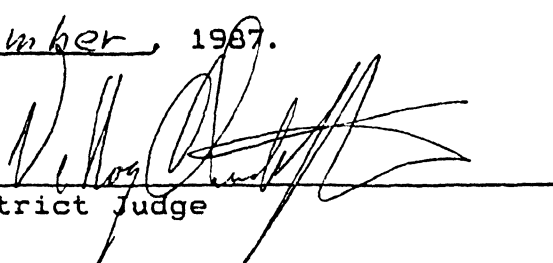
IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY,
STATE OF UTAH

STATE OF UTAH,)	AMENDED ORDER DENYING MOTION
)	FOR TRANSFER OF TRIAL AND
Plaintiff,)	DENYING MOTION FOR ORDER
)	AUTHORIZING SURVEY OF
vs.)	POTENTIAL JURORS
STEVEN RAY JAMES,)	Case No. 3547
Defendant.)	

The above entitle matter came before the above entitled court on the 18th day of June, 1987, upon Defendant's Motions for Transfer of Trial and for Order Authorizing Survey of Potential Jurors, the Honorable VeNoy Christoffersen presiding. The Plaintiff was represented by Jeff "R" Burbank and James C. Jenkins. The Defendant was present and represented by Nathan D. Hult. The court examined the pleadings on file and after having heard the evidence presented by the parties, made and entered the following order:

IT IS HEREBY ORDERED that Defendant's Motions for Transfer of Trial and for Order Authorizing Survey of Potential Jurors are denied.

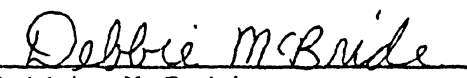
DATED the 6 day of November, 1987.


District Judge

MAILING CERTIFICATE

I hereby give notice that I mailed a copy of the foregoing:
AMENDED ORDER DENTING MOTION FOR TRANSFER OF TRIAL AND DENYING
MOTION FOR ORDER AUTHORIZING SURVEY OF POTENTIAL JURORS to the
below named individuals on Nov 6, 1987.

Jeff "R" Burbank
James C. Jenkins
Cache County Attorney's Office
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Logan, Ut 84321


Debbie McBride