

1979

State of Utah v. Eugene Andreini : Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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STATE OF UTAH,)	
Plaintiff-Respondent,)	
-v-)	Case No. 16518
EUGENE ANDREINI,)	
Defendant-Appellant.)	

- - - - -

REPLY BRIEF OF APPELLANT

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APPEAL FROM JUDGMENT OF THE
DISTRICT COURT OF CARBON
COUNTY, STATE OF UTAH,
HONORABLE ERNEST F. BALDWIN
JR., PRESIDING.

- - - - -

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TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF FACTS.....	1
ARGUMENT	
I: THE DENIAL OF APPELLANT'S RIGHT TO TAKE DEPOSITIONS IS REVERSIBLE ERROR	2
A. THE CLAIM IS SUPPORTED BY THE RECORD AND BY AFFIDAVIT.....	2
B. APPELLANT HAS SHOWN THAT THESE DEPOSITIONS WERE NECESSARY AND THAT THE DENIAL WAS PREJUDICIAL.....	2
II. APPELLANT'S RIGHT OF CONFRONTATION HAS BEEN DENIED SINCE CROSS-EXAMINATION WAS IMPROPERLY LIMITED.....	6
CONCLUSION.....	10
AFFIDAVIT OF TRIAL JUDGE.....	13

CASES CITED

Bram v. United States, 168 U.S. 532, 42 L.Ed. 568,577, 18 S.Ct. 183 (1897).....	6
Chapman v. California, 386 U.S. 18 (1967).....	7
Davis v. Alaska, 415 U.S. 308 (1976).....	7
Oberg v. Sanders, 111 Utah 507, 184 P.2d 229 (1947)...	8
State v. Maestas, 564 P.2d 1386 (Utah 1977).....	9
State v. Smelser, 13 Utah 2d 347, 463 P.2d 562 (1970).	9
State v. Peek, 1 Utah 2d 263, 265 P.2d 630 (1953).....	8
United States v. Alford, 282 U.S. 687 (1930).....	8
Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862	9

STATUTES

Utah Code Ann. §77-45-20 (1971).....	2
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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,)	
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Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

SUPPLEMENTAL STATEMENT OF FACTS

The following statement of facts is provided to clarify the questions arising from respondent's Brief at pages 5 and 9. These facts, as developed below, will serve to demonstrate how the appellant was prejudiced by the states' depositions, and how he was injured by his inability to respond to them.

On September 11, 1978, before the preliminary hearing and before the trial in the instant action, the Carbon County Attorney's Office deposed several witnesses, among them, William Robertson, William Crissman, and Ken Oviatt. Evidently, the Carbon County Attorney Office acted under the authority

of the Utah Code Ann. § 77-45-20 (1971), which states in substance that the County Attorney shall have the right, upon application to the District Court for good cause shown, to subpoena witnesses and depose them. The attorney for the witnesses shall be notified of such deposing so he can be present. Such depositions were taken but never was application made to the District Court by the County Attorney, nor was good cause shown. Also, no notice of taking depositions was sent to defendant or his counsel, nor were any of the witnesses allowed to consult an attorney or have one present during the deposition.

I

THE DENIAL OF APPELLANT'S RIGHT TO TAKE
DEPOSITIONS IS REVERSIBLE ERROR.

A

THE CLAIM IS SUPPORTED BY THE
RECORD AND BY AFFIDAVIT.

As the attached affidavit of the trial judge indicates the motion to take deposition was made at the beginning of the trial and was denied by Judge Baldwin. The motion was made in open court the morning of the trial, before the trial judge and opposing counsel.

B

APPELLANT HAS SHOWN THAT THESE
DEPOSITIONS WERE NECESSARY AND THAT
THE DENIAL WAS PREJUDICIAL.

As was already stated in appellant's brief on pages 4 thru 7, such a ruling by the trial court judge was reversible error. Even Rule 81(e) U.R.C.P. was not designed to deprive a defendant of his constitutional rights.

What respondent states regarding defendant's right to take a deposition under Section I (B) of his brief applies equally well to the prosecution. Never once did the prosecution make application to the district court to take these depositions. Never once did the prosecution show any good cause for the taking of depositions, nor made any allegations that the witnesses to be deposed were ill, about to die or about to leave the court's jurisdiction. Since there was total statutory non-compliance by the prosecution, why should they be allowed to profit thereby, i.e. being able to wave the defective depositions over the heads of the witnesses with threats of impeachment and perjury to coerce them to tell what the prosecution thinks is true. The defendant certainly never did obtain that kind of an advantage.

The denial to take the depositions was prejudicial for the above reasons as well as the fact that defendant was denied that opportunity. The defendant was never able to threaten any of the prosecution's witnesses with impeachment or perjury.

Respondent's brief delves into the right of defendant to take depositions under prescribed conditions. That brief overlooks the way in which the law was violated by the prosecution as it relates to depositions.

To allow respondent to violate the law and profit thereby, yet not afford an opportunity to defendant to equalize the effects of that violation operates as a prejudice against defendant.

The effects of violation are unmeasured, yet the unlawful influence was there. The effect of the prosecution's ex parte deposition was to support and to compel. To suggest, because the prosecution controlled the line of questioning, they were not interested in exculpatory evidence.

Certainly, the deponents must have been aware of the state's adversarial position to defendant; therefore, they must have felt induced to cooperate. Also, no one was there, other than the prosecution, to voir dire or cross-examine the witnesses, which would have helped assure that the witnesses did not respond inaccurately or incompletely to the enthusiastic, one-sided questions of the prosecution. Naturally, the aspects of recollection favorable to the state's case would have been reinforced. While all other recollection was not.

Once the witnesses made these statements under oath, the witnesses were "locked in" to their testimony. That coupled with the last minute threat of the prosecution, would have made it so they could not afford to admit error in their recollection. They could no longer feel free to respond according to their contemporaneous, spontaneous recollection of facts as presented during the trial. The effect of the above compulsion was to "chill" their testimony -to thwart a full disclosure of the facts at both the preliminary hearing and the trial, as well as affecting their demeanor by causing them to appear more apprehensive and less confident; thus, less credible.

This immeasurable impact of the prior sworn testimony falls directly upon defendant. These witnesses were his - they comprised his case in chief; therefore, any "chilling" effect fell directly upon the merits of the defense. Further, by threatening these witnesses, the prosecution stepped over the line of fair play and conscionable conduct expected of a public officer in pursuit of truth, creating reversible prejudice.

Confronted by this coercive situation, the defense requested of the court permission to depose the witnesses in order to assume a "balance" at trial. The court denied the motion, despite the fact that it was fully aware of the

prior ex parte depositions. This was reversible error.

Speaking of confessions, but relative and analogous to the facts presented by this case is the statement in Bram v. United States, 168 U.S. 532, 42 L.Ed. 568, 577, 18 S.Ct. 183 (1897): "[F]or the law cannot measure the force of the influence used, or decide upon it's effect upon the mind of the [witnesses], and therefore [should] exclude the [depositions and their impeachment purpose] if any degree of influence has been exerted."

II

APPELLANT'S RIGHT OF CONFRONTATION HAS BEEN DENIED SINCE CROSS-EXAMINATION WAS IMPROPERLY LIMITED.

At trial, defense counsel was curtailed from conducting a thorough cross-examination at several points. The trial judge sustained the prosecution's objections at several points that the questions were irrelevant and argumentative. To the contrary, the defendant was attempting to elicit responses highly material to the defense, and the trial court's denial of such cross-examination constituted reversible error.

In United States v. Alford, 282 U.S. 687 (1930) the United States Supreme Court held that a denial of reasonable latitude in cross-examination was prejudicial error.

that it was not necessary to show that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief. In Davis v. Alaska, 415 U.S. 308 (1976) the United States Supreme Court stated that denial of the right of effective cross-examination was constitutional error of the first magnitude which no amount of showing of want of prejudice could cure. And in Chapman v. California, 386 U.S. 18 (1967) the court held that if there is a denial of the right of confrontation of the principal witness(es) against the defendant, the conviction must be reversed unless the appellate court can state beyond a reasonable doubt that no prejudice occurred. (Emphasis added).

This court has recognized the value of cross-examination many times in the past. As stated in Weber Basin Water Conservancy District v. Ward, 10 Utah 2d 29, 347 P.2d 862 (1959), the purpose of cross-examination is to give adversary counsel the opportunity not only to inquire into uncertainties pertaining to the testimony in chief, but to inquire into credibility; and whatever may make plain, modify or contradict the evidence should be allowed. Even though the trial court generally has discretion to control cross-examination within reasonable limitations, he may not so reject it so to prevent inquiry into matter having a direct bearing on

the issued. Again in Oberg v. Sanders, 111 Utah 507, 18 P.2d 229 (1947) this court reaffirmed the above by stating that the testimony of a witness is no stronger than where it is left on cross-examination. In the preceding cases as well as many others, this court has reversed the decision of the trial court based upon the improper restrictions exacted upon trial counsel in his pursuit of a full cross examination. See State v. Peek, 1 Utah 2d 263, 265 P.2d (1953). Appellant maintains that in the case at bar such restrictions as were placed upon defense counsel constituted reversible error.

Respondent, in his brief at 9, avers that the questions posited to the state's chief witness were irrelevant and argumentative. To the contrary, trial counsel was directed his questions to the witness in order to establish facts and inferences of merit. Counsel was attempting to elicit from the complaining witness the extent of his injuries, clearly a material element to be proven by the state, as well as the likely cause of the witness' injuries. (TR 33)

The affirmative defense of self defense would necessarily involve the state of mind of the victim. Counsel was denied cross-examination designed to expose the fact that the witness indeed had exhibited hostility toward the defendant in an encounter with the defendant's wife at the Hollow

Bottle prior to the incident involved at trial. To deny the defendant the opportunity here to develop his defense of self defense was clearly reversible error.

Respondent, in his brief, states that the appellant has a dual burden in establishing reversible error; that the error was committed by the trial court; and that such error resulted in clear prejudice. Such a conclusion should be limited to the facts of the case to which respondent refers. In that case cited by respondent, State v. Maestas, 564 P.2d 1386 (Utah 1977) this court cited State v. Smelser, 13 Utah 2d 347, 463 P.2d 562 (1970). In Smelser, the court recognized that the information sought to be produced from the witness was simply cumulative - it had already been elicited. Because of that, the court was willing to rule as a matter of law that the denial of further cross-examination was not prejudicial. In Maestas, supra, the same reasoning was followed by the court - Justice Hall stating: "Courts have found no prejudice where information that may be brought out by further questioning was already before the jury, either from the testimony of others or by implication from the witness' own testimony".

In the case at hand, the information sought to be elicited was never before the jury. Since that information

was material to the defense, a denial of the same is reversible error.

Since the gravamen of defendant's case was self defense, it was necessary for the defense to establish the state of mind of the victim, his past actions toward defendant, as well as the amount of force the victim used which had to be repelled by defendant. With the trial court's denial of this particular part of the cross-examination, defendant was unable to fully develop his defense of self defense. Such is reversible error.

The complaining witness was able to testify under direct, the way he wanted; however, by denying defendant the effective right of cross-examination, the complainant testimony went unchallenged.

CONCLUSION

The attached affidavit of Judge Baldwin should allow any argument that a proper record of the defendant motion was not before this reviewing court. The motion was made and denied as is now attested to by Judge Baldwin.

The effect of the trial judge's denial of defense's motion to take depositions was highly prejudicial to defendant in that defendant was unable to balance out or cure the improper taking of the depositions by the prosecution. As

before stated, the prosecution never made proper application to the district court since no good cause was shown, i.e., that any of the witnesses were leaving the jurisdiction, were ill or about to die, etc. The witnesses did not have their attorneys available or present. Defense was never notified of the taking of the depositions; hence, were unable to effectively counter the same. The fact of the unlawful dispositions coupled with the threats made by the prosecution on the eve of trial had a "chilling" effect upon defendant's witnesses' testimony. The influence there was immeasurable; hence the trial judge's denial should be reversed.

The denial of defendant's right to effectively cross-examine the complainant prejudiced him in that defendant was effectively denied the right to develop his affirmative defense of self defense. Such denial vitiated any fair trial to which defendant was entitled. Defendant, under his rights guaranteed by the U. S. Constitution as well as the Utah Constitution, is entitled to develop fully any potential defenses he has in a criminal trial. This he was prohibited from doing.

For the above stated reasons, Appellant urges this Court to reverse the conviction rendered in the court below.

DATED this 27th day of August, 1980.

Respectfully Submitted,

PHIL L. HANSEN
HANSEN AND HANSEN

By Phil L. Hansen
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the foregoing Reply Brief of Appellant to the Attorney General at the State Capitol Building on this 29th day of August, 1980.

Phil L. Hansen

ADDENDUM

AFFIDAVIT OF TRIAL JUDGE

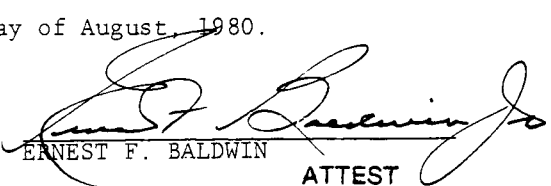
ERNEST F. BALDWIN, being first duly sworn deposes and says:

1. That he was the presiding trial judge in the trial of State of Utah vs. Eugene Andreini, held in the District Court of Carbon County, State of Utah, on April 24 and 25, 1979.

2. That the attorney for defendant, Phil L. Hansen, *On the day of trial and after case was called to Court* in the morning of April 24, 1980, made a motion before affiant to take the depositions of the potential witnesses involved in the case.

3. That affiant denied defendant's motion to take the deposition of witnesses.

DATED this 28 day of August, 1980.



ERNEST F. BALDWIN

STATE OF UTAH)
COUNTY OF SALT LAKE) ss.

ATTEST

W. STEALING EVANS
CLERK

BY


Deputy Clerk

SUBSCRIBED TO AND SWORN before me this 7 day of

August, 1980.

NOTARY PUBLIC, Residing in Salt
Lake County

My Commission Expires: