

1979

State of Utah v. Eugene Andreini : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANT

Appeal from Judgment of the
District Court of Carbon County, State of Utah
Honorable Ernest F. Baldwin, Jr., Judge

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-v- : No. 16518
EUGENE ANDREINI, :
Defendant-Appellant. :

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the District Court of Carbon County, State of Utah, with the Honorable Ernest F. Baldwin, Jr., Judge, presiding as a substitute for the Honorable Boyd Bunnell, Judge, who disqualified himself.

The appellant was charged with aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103(b), and the appellant was convicted of simple assault, a Class B Misdemeanor, in violation of Section 76-5-102, Utah Code Annotated (1953), as amended.

RELIEF SOUGHT ON APPEAL

The appellant seeks to have his conviction reversed or in the alternative remanded for a new trial after he has

had the right to take the depositions he was denied before the trial from which this appeal is taken.

STATEMENT OF FACTS

On the 10th day of June, 1978, at the Savoy Club, a bar in Price, Carbon County, Utah, there was a fight between the appellant and James R. Priano. (Tr. 148.)

The respondent contends that while Priano was talking to another, the appellant struck Priano with a pool stick. (Tr. 13.)

The appellant contends he struck Priano in self-defense (Tr. 146) only after Priano had struck the first blow by giving a backhand to the appellant's head which knocked off his prescriptive glasses. (Tr. 180.)

Other than the appellant and Priano, there were only two eye witnesses who saw the fight begin. Both of them testified that before the appellant had done anything physical toward him, Priano struck the first blow in the same manner as contended by the appellant. (Tr. 150, 161, 162.)

In addition to wearing prescriptive glasses, the appellant also suffered from a back injury he received when 13 years old by having been run over by a truck. (Tr. 178.)

After being struck by Priano, the appellant went down to the floor and came up with a pool stick from an area where broken pool sticks were customarily kept. (Tr. 151.)

The pool stick was in the appellant's left hand. And the

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appellant is right handed. (Tr. 180.)

There was fighting, wrestling, and scuffling between the appellant and Priano. (Tr. 13, 17, 37, 38, 45, 76, 77, 78, 80, 148, 150, 158, 161, 162, 173, 180, 181, 184, 185.) And others separated them. (Tr. 15, 17, 64, 65, 70, 71, 76, 78, 79, 80, 81, 151, 162, 173.) All of it lasted only about 30 seconds. (Tr. 17.) It was a very short time. It was over just like that, really. (Tr. 151.)

Even after the two had been separated, Priano walked toward the appellant (Tr. 17, 45, 181), gritting his teeth and holding his arms like he was going toward the appellant again. (Tr. 181.) He turned and left the scene only after being threatened by the appellant. (Tr. 181.)

The above constitutes a general statement of the appellant's version of the facts. Other details will be cited in support of the points of argument.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED BY DENYING
APPELLANT'S MOTION TO TAKE DEPOSITIONS
BEFORE TRIAL.

The appellant filed a motion to take depositions before the lower court with the purpose of obtaining additional information from witnesses and using said information for its impeachment value on cross-examination. The lower court

denied appellant's motion.

In the case of State v. Guerts, 11 Utah 2d 345, 359 P.2d 12 (1961), the Utah Supreme Court unanimously held in an opinion written by then-Justice Crockett that it was error for the accused to be denied the right to take depositions before trial. At page 16 he stated:

D. The most serious attack upon the judgment is that the court erred in rejecting defendant's request to take depositions of the witnesses. We willingly concede that it is difficult to understand why the district attorney opposed the taking of depositions. He may have misconceived his duty. Notwithstanding the fact that under our adversary system it is essential that he represent and safeguard the interests of the State, it is neither necessary nor desirable that a prosecutor conduct either a persecution or an inquisition. His responsibility is to assist in an inquiry into the facts to ascertain the truth to the end that justice be done. While we do not deem it to be grounds for reversal here, for reasons explained below, we are not favorably impressed with the failure to permit the taking of depositions of the witnesses.

Four justices held such error not be be prejudicial because the defendant in that case failed to claim that he would have obtained any additional information from the depositions and because he had failed to assert the depositions' value for purposes of cross-examination at trial.

The fifth justice, then-Justice Henriod, dissented, believing it was prejudicial error to deny the accused the right or privilege of taking depositions, and stated:

The main opinion points out correctly that the accused had access to information obtained by the Grand Jury, (citations omitted) and was furnished answers by the district attorney to interrogations put to him. But it loses sight of the fact that such information was not the product of sworn testimony elicited by questions put by counsel of the accused's choice. It seems to lose sight also, of the fact that . . . the right to take depositions frequently [is] the sharpest weapon available to counsel in piercing subsequent testimony by confrontation with prior inconsistent testimony. Such an opportunity, denial of which appellant assigned as error, quite frequently results in impeachment that may make the difference between guilt or innocence in the minds of veniremen. At 359 P.2d 18. (Emphasis added.)

In concurrence with Justice Crockett's proposal of proper prosecutorial procedure, it is submitted that the vestiges of sporting event surprise trials of the past should now yield to the modern due process fairness model in search of truth and justice.

Later, the Utah Supreme Court, in its opinion written by then-Justice Tuckett in the case of State v. Nielsen,

522 P.2d 1366 (Utah 1974), surprisingly ruled, without reference to its unanimous decision to the contrary in Guerts, supra, that it was not error for an accused charged by complaint to be denied the right to take depositions before trial, except when a material witness for the defendant is about to leave the state or is so ill or infirm as to afford reasonable grounds for apprehension that he will be unable to attend the trial. Then-Justice Ellett and Justice Crockett dissented in the Nielsen case, with the controversy centering around Rule 81(e) of the Utah Rules of Civil Procedure (URCP).

That rule provides:

Application in criminal proceedings.
These rules of procedure shall also
govern in any aspect of criminal
proceedings when there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement. (Emphasis added.)

In Nielsen the defendant argued, and the appellant in the instant appeal now argues, that Rule 30 (URCP), which provides that "any party may take the testimony of any person . . . by deposition upon oral examination" is applicable through Rule 81(e) to criminal proceedings.

The majority in Nielsen, no longer sitting on the Utah Supreme Court, found Rule 30 (URCP) to be in conflict with Utah Code Ann. §§ 77-46-1 and 2. Justice Crockett in his dissent

persuasively pointed out that in fact no conflict exists as §§ 77-46-1 and 2 do not cover the taking of depositions. Justice Crockett concluded:

Allowing depositions in this and other criminal proceedings would be consistent with the spirit of Rule 81(e); with the national trend, and would correlate our criminal procedures with our new Criminal Code's policy against arbitrary or oppressive treatment of accused persons. At p. 1369. (Emphasis added.)

Additionally, the majority in Nielsen was concerned with the possibility that the prosecution would attempt to take the deposition of a defendant and thus violate his right against self-incrimination. Again, Justice Crockett pointed out that the majority's concern was not warranted: "No one supposes that any procedural rule could deprive a person of his constitutional rights; and Rule 81(e) clearly so indicates." At p. 1369. (Emphasis added.)

In sum, the appellant argues that this court should adopt now-Chief Justice Crockett's dissenting opinion and overrule the Nielsen case.

In Granato v. Salt Lake County Grand Jury, 557 P.2d 750 (Utah 1976), the majority never reached the issue of depositions being taken by the defendant. In Justice Maughan's dissent at p. 755:

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Plaintiff finally urges he should be permitted to take depositions, and that State v. Nielsen, Utah, 522 P.2d 1366 (1974) should be overruled. With this contention, I am in complete agreement. A defendant in a criminal action should be permitted to take depositions; . . .

He then writes Justice Henriod's dissent in Guerts quoted above in appellant's brief.

The time is long past due to correct this inequality of justice in Utah between the right of a defendant in a civil case, the right of state in a criminal case and the denial of a defendant in a criminal case to take depositions for the same purposes. If the right to take depositions is afforded a defendant in civil cases, where he stands to lose only his dollars and cents, surely that same right should be afforded a defendant in a criminal case, where he stands to lose his life or liberty.

This court should reverse the lower court's order denying the appellant's motion to take depositions and remand this matter to the lower court with the order that the appellant be granted the right to take depositions for discovery, cross-examination, impeachment, confrontation, or any other purpose afforded a party in a civil case.

Such a ruling would be consistent with the mandates of the due process and equal protection clauses of the United States Constitution and Utah Constitution, and of the

confrontation of witnesses guarantee of Article I, Section 12 of the Utah Constitution.

This case on appeal particularly points out the discriminatory denial of equal protection to the defense to take depositions while allowing the prosecution that power, which it exercised September 11, 1978, before preliminary hearing and trial. (Tr. 148, 156, 163, 168, 171.)

Pursuant to Utah Code Ann. § 77-45-20, the State has powers to depose witnesses in the investigation of crime, even secretly, if necessary. To deny the defense that right of investigation technique for preparation of his defense is a denial of equal protection. There is no policy reason to justify perpetration of this inequality. The accused is presumed innocent until convicted, and he should be afforded the same rights as the government in preparation of his case.

Even the new rules of criminal evidence provide for both parties to take depositions.

POINT II

THE DISTRICT COURT ERRED BY DENYING
APPELLANT'S RIGHT TO CONFRONTATION BY
PROPER CROSS-EXAMINATION.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Utah Constitution has a similar provision

found in Article I, Section 12.

The United States Supreme Court has held the Sixth Amendment's right of an accused to confront the witnesses against him is a fundamental right binding upon the states through the Fourteenth Amendment's due process clause. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

"The right of confrontation embraces the right of cross-examination." Chester J. Antieau, Modern Constitutional Law, Sec. 5:74, Vol. One, 1969, The Lawyers Cooperative Publishing Company.

Wigmore, in his treatise on evidence, calls cross-examination "the greatest legal engine ever invented for the discovery of truth." V Wigmore on Evidence § 1367 (3rd ed.).

It is submitted that for the above reasons careful, strict scrutiny should be given to the restrictive rulings during appellant's cross-examination of the victim. The rulings prohibited examination designed to bring out the truth of the event. This limitation upon the fact-finding process is patent error. Broad scope should be afforded to the cross-examiner to elicit the full facts of the occurrence. This was denied and an injustice resulted.

This court is invited to read the transcript with strict scrutiny at pages 28, 29, 31, 32, 33, 34, 39, 40, 43, 44, 45, 46, 47, 49, 50, 71, 96, 127, 132, 133, 139, 140, 142, 143, 144, 145, 198, 199.)

As examples, the appellant was not permitted to have Priano give his lay opinion relative to common matters such as comparing types of scratches he received then and at other times. (Tr. 33, 34.)

The appellant was not permitted to show possibilities relative to self-defense other than as testified to by Priano. (Tr. 39.)

The appellant was not permitted to show through Priano that other witnesses disagreed with him relative to who struck the first blow. (Tr. 40.)

The appellant was not permitted to show through Priano that at no time did the appellant poke Priano in the forehead with the pool stick. (Tr. 43.)

The appellant was not permitted to show through Priano that the event could have happened other than as Priano testified on direct examination. (Tr. 44.)

The appellant was not permitted to show through Priano what was said and done between Priano and the appellant's wife at a prior time at the Hollow Bottle relative to the appellant's state of mind. (Tr. 44, 45, 46, 49, 50, 67, 68, 71, 144, 145.) It was not hearsay because it was not offered for the truth of matter asserted. It was offered only to show the appellant's state of mind. (Tr. 145.)

The appellant was not permitted to show through Priano that his injuries could have been caused by means other

than the pool stick, such as wrestling, scuffling, and bumping into other objects. The appellant state there was evidence of wrestling and scuffling. The court ruled there had not been such evidence (Tr. 127), when in fact there had been such evidence. (Tr. 15, 17, 37, 38, 44, 64, 65, 66, 70, 71, 76, 77, 78, 79, 80, 81, 150, 151, 158, 161, 162, 173, 180, 181, 184, 185.)

The appellant was not permitted to show bias by close relationship between witnesses relative to credibility. (Tr. 198, 199.)

Although perhaps any one of these erroneous rulings would not have amounted to prejudicial error, cumulatively they reached that level and denied the appellant effective cross-examination to insure his right to confrontation.

In Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965), it was held that the Sixth Amendment's right of an accused to confront the witnesses against him was a fundamental right, essential to a fair trial, and was made obligatory on the states by the due process clause of the Fourteenth Amendment; and that the confrontation clause of the Sixth Amendment was thus enforceable against the states under the Fourteenth Amendment according to the same standards which protect the right to confrontation against federal encroachment.

To the same effect are: Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); Brookhart v.

Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966); Parker v. Gladden, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420 (1966); Re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968); Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 reh. denied 392 U.S. 947, 88 S. Ct. 2270, 20 L. Ed. 2d 1412 (1968); Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508; Frazier v. Cupp, 394 U.S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684; Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969).

A primary purpose of the confrontation clause is to secure the right of cross-examination. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); Douglas v. Alabama, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965); Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968); Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

The Supreme Court has established that under certain circumstances the restriction of the scope of a defense attorney's cross-examination of a particular prosecution witness may constitute a violation of an accused's constitutional

right of confrontation. Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

In this case, the restricted cross-examination was of the State's principal witness. A thorough searching, sifting of his recollection of the event, his credibility, his motive, prejudices, and his inclinations were thwarted by the cumulative effect of the trial court sustaining the State's objections. The cross-examination, as a reading of the transcript shows, was not by design argumentative but rather to impeach the witness. The right to impeach a witness by cross-examination is universally recognized. Am. Jur. Witnesses § 676.

CONCLUSION

The time is ripe for reversing the sporting event surprise tactics of the Nielsen case, supra.

A criminal trial should be a search for the truth. Defense depositions taken before trial can aid that endeavor by preserving recitations of fact as in civil trials. Allowing defense depositions enhances the defendant's right to confrontation, preservation of testimony, and the impeachment of witnesses.

The inequities of this case wherein the government takes depositions without the presence of the defense and the defense is denied that opportunity patently discriminates

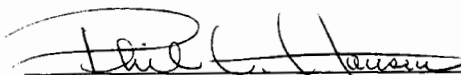
without any worthy policy consideration.

And such restrictive cross-examination because of the many erroneous evidentiary rulings amounts to a denial of an adequate defense.

This court should reverse or remand with an order allowing depositions and a new trial with guidelines for proper evidentiary rulings.

DATED this 12th day of March, 1980.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellant were served on the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 12th day of March, 1980.

