

1980

State of Utah v. Eugene Andreini : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

EUGENE ANDREINI,

Defendant-Appellant.

BRIEF OF RESPONSE

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

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IN THE SUPREME COURT OF THE
STATE OF UTAH

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

----- : -----
BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant was charged with aggravated assault in violation of Utah Code Ann. § 76-5-103(b) (1953 as amended). He was convicted on April 25, 1979, of simple assault in violation of Utah Code Ann. § 76-5-102 (1953) as amended. This is an appeal of that conviction.

DISPOSITION IN THE LOWER COURT

The appellant was tried and convicted by a jury in the District Court of Carbon County, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

RELIEF SOUGHT ON APPEAL

The Respondent seeks an affirmance of the conviction in the court below.

STATEMENT OF THE FACTS

On June 10, 1978, James R. Priano entered the Savory Club in Price, Utah to speak with Billy Crissman about donations for a school reunion. While the two men talked, the appellant entered the room, went behind the bar and then began beating Priano over the head and back with a pool stick. (R. 13-14) Priano fell onto the bar and the appellant grabbed Priano by the hair and poked him in the forehead with the cue. (R. 15) Priano tried to get the pool stick out of the Appellant's hands and two men finally separated the Appellant and Priano. (R. 66) After being separated the Appellant stated that if Priano ever said anything to his wife again, he would kill Priano. Priano came toward the Appellant; the Appellant threatened to put out Priano's good eye if he came any closer. (R. 15) Priano then left the tavern and was later convinced by friends to contact the police about the incident.

Appellant approached Priano in the Savory Club because of a prior incident. That incident had occurred approximately six months earlier in a tavern called the Ho Bottle. At that time Priano had talked with the Appellant wife about the time, one year earlier to the day, that the appellant had killed a man "over his wife." (R. 15, 16).

ARGUMENT

POINT I

APPELLANT'S CLAIM THAT HE WAS NOT
ALLOWED TO TAKE DEPOSITIONS IS
WITHOUT MERIT.

A

THE CLAIM IS NOT SUPPORTED
BY THE RECORD.

Appellant's brief at pages 13 and 14, states that a motion to take depositions was filed with and denied by the lower court. No such motion has been placed in the record on appeal; no order denying the alleged motion appears in the record. There have been no supplemental materials included in the record on appeal that relate to a motion to take depositions. The only request for material from the prosecutor was a motion for exculpatory evidence. (P. 15) The prosecution complied with this request (R. 16).

The appellant has failed to include in the record all documents necessary to arrive at full consideration of the question presented for review. This Court has held that it will not consider facts not properly supported by the record. Hokerman v. Lincoln National Life Ins. Co., 588 P.2d 142 (Utah 1978); Utah Rules of Civil Procedure, Rule 75(p)(2) states that an appellant's brief must contain "a concise statement of the material facts of the case citing the pages of the record supporting such statement." Appellant has

failed to comply with this rule since the allegation that a motion for depositions was filed with and denied by the court cannot be substantiated by the record. Respondent contends that this rule requiring substantiation by the record is applicable to a criminal case. Rule 81(e) of the Utah Rules of Civil Procedure provides:

These Rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided, that any rule so applied does not conflict with any statutory or constitutional requirement.

There is no criminal procedure rule specifically dealing with briefs on appeal or the need for substantiation of material facts by the record. Respondent, therefore, submits that Uckerman and Rule 81(e)(2) apply to this case. Appellant's argument that he was not allowed to take depositions should not be considered by this Court.

Furthermore, the accuracy of Appellant's content cannot be assumed. As far as trial counsel is concerned no request, written or oral, was made to take depositions; and as far as this Court is concerned, based on the record and the rules governing appeals, there was no request made or decision rendered on the motion. Therefore, Appellant's claim that he was not allowed to take depositions should not be considered since the allegation is unsubstantiated.

and not properly before this Court.

B

THE APPELLANT HAS FAILED
TO SHOW THAT DEPOSITIONS
WERE NECESSARY OR THAT THE
ALLEGED DENIAL WAS PREJUDICIAL.

The appellant contends that a motion to take depositions was made and denied and that those depositions would have been used to cross-examine witnesses at trial. However, the appellant fails to allege facts indicating why the depositions were needed. There is no showing that additional information would be revealed or that the witness could not be present at trial. Nor is there any allegation that the witness was a material witness.

In State v. Nielsen, 522 P.2d 1366 (Utah 1974) this Court held that it was not error to deny the taking of depositions except when a material witness was about to leave the state or was so ill or infirm that he was unable to attend the trial. The Court explained that Utah Code Ann. § 77-46-1 and § 77-46-2 (1953) limited the right to take depositions in criminal cases and unless the conditions set forth in those statutes were met, no deposition could be taken. Those provisions read as follows:

77-46-1. On behalf of defendant charged with offense or malfeasance in office—
Of witnesses within state.—When a
defendant has been held to answer a

charge for a public offense or malfeasance in office he may, either before or after an indictment or information, have witnesses examined conditionally on his behalf as prescribed in this chapter, and not otherwise. (Emphasis added).

77-46-2. Application for examination.—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 apprehending that he will be unable to attend the trial, the defendant may apply for an order that the witness be examined conditionally.

This court's analysis of these statutes in State Nielsen is similar to that used by other courts. Depositions in criminal cases were unknown at common law. For this reason the authority to permit the taking of depositions in criminal cases is derived from statutory law. See State v. Berry, 520 P.2d 558 (N.M. 1974); Williams v. State, 19 Md. 582, 313 A.2d 750 (1974); Blanchard v. State, 21 Okl.Cr. 207 P.96 (1893). "Depositions in criminal cases cannot be taken in behalf of a defendant except by authority of state Baker v. People, 72 Colo. 68, 209 P. 791, 794 (1922)

In Parmenter v. State of Oklahoma, 377 P.2d 842 (Okla. 1963) the court interpreted a statute . . . almost identical to Utah Code Ann. § 77-46-1. The court explained that the statute fixed the only time when depositions could be taken in criminal cases and that if those conditions were not met, depositions "shall not be taken otherwise." Id. at 844.

The Appellant argues that Rule 81(e) of the Rules of Civil Procedure gives the defendant in a criminal case the right to depose any person. Rule 81(e) states:

Application in Criminal Proceedings.
These Rules of procedure shall also govern in any aspect of criminal proceedings where 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).

Utah Code Ann. § 77-46-1 and § 77-46-2 clearly refers to the taking of depositions in behalf of a defendant in a criminal case. Since those provisions conflict with the broader authorization in Rule 81(e), that rule cannot allow the defendant in a criminal case to depose "any person" without restriction. The language of Rule 81(e) limits its applicability because there is [an] "other applicable statute or rule."

A defendant, therefore, does not have an inherent unqualified right to take depositions in a criminal case. See People v. Bowen, 99 Cal. Rptr. 498 (1971). The imposition of certain conditions upon the ability to take deposition is in accord with the position taken in many states. For example, in Texas the right to take depositions is available if "good reason" is shown. Martin v. State, 422 S.W.2d 731 (Texas 1967). That court did not allude to what would be a "good reason" but the case illustrates that the defendant must at least give some reason why depositions are needed. In Colorado,

depositions may be taken in criminal cases where there is some reason to believe that the witness may not be available at the trial. Kelly v. People, 121 Colo. 243, 215 P.2d 336 343 (1950). There is no indication that the witness here could not be present at trial.

The decision reached in State v. Nielsen is sensible. A defendant is allowed to take depositions when the witness would not be available for examination at trial. When the facts do not indicate that the witness would be unavailable, depositions are not necessary and their implementation might only cause delay. In this case, the appellant has not shown that the facts and circumstances of the case necessitated the taking of depositions. The appellant alludes to the case of State v. Guerts, 11 Utah 2d 345, 359 P.2d 12 (1961) which did not qualify a defendant's right to depositions, however, that case is limited by the more recent decision of State v. Nielsen in 1974. Furthermore, the facts found by the Court in Guerts, distinguish that case from the situation here. In Guerts, this Court was concerned by the prosecutor's conduct in automatically rejecting the defendant's request to take depositions. Here, there is no evidence of similar prosecutorial misconduct and, in any event, the court in Guerts found that the refusal did not justify reversal.

Respondent likewise contends that even if the mo

to take depositions were denied and such denial was error, the appellant has not shown that he was prejudiced thereby. The record does not show that depositions were necessary, that the witness was "ill or infirm" or that he could not be present at trial.

POINT II

APPELLANT'S RIGHT OF CONFRONTATION HAS NOT BEEN DENIED SINCE CROSS- EXAMINATION WAS PROPERLY LIMITED.

Appellant contends that his right of confrontation was violated because cross-examination of the victim, Briano, was restricted. It is a well-settled principle of law that the extent of cross-examination is a matter which lies within the sound discretion of the trial judge. State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1972). This discretion will not be interfered with by the Supreme Court unless there is an abuse of discretion to the prejudice of the defendant. State v. Belwood, 27 Utah 2d 214, 494 P.2d 519 (1972).

In each incidence at trial where Appellant claims that cross-examination was unduly restricted (See Appellant's Brief at 11), the trial court properly disallowed irrelevant or argumentative lines of questioning. An examiner may not ask irrelevant questions or questions which call for no new fact but merely invoke the witness's assent to the examiner's inferences from or interpretations of the facts proved or

assumed. McCormick on Evidence, § 7 at 12 (1954). Further the trial court was concerned with the dialogue on page 15 the transcript not because it may have been hearsay but because it was irrelevant and argumentative.

This Court has consistently held that, even in criminal cases, the field of cross-examination is largely within the discretion of the trial court where ruling will not be disturbed except in cases of clear abuse of discretion. State v. McIntyre, 92 Utah 177, 66 P.2d 879, 888 (1937).

[R]eviewing courts ought to be very careful, and should hesitate long before reversing judgments upon the ground that the trial court either restricted or enlarged the scope of cross-examination.

State v. Murphy, 72 Utah 382, 68 P.2d 188, 193 (1937).

This court has continued to uphold the trial court's discretionary powers with regard to cross-examination. State v. Starks, 564 P.2d 1015 (Utah 1978); State v. Maestas, 564 P.2d 1386 (Utah 1977); State v. Curtis, 542 P.2d 744 (Utah 1975); State v. Anderson, 27 Utah 2d 276, 495 P.2d 804 (1970). In State v. Maestas this Court stated that even should the trial court err in unduly limiting cross-examination, such would not be reversible error without a showing of prejudice. 564 P.2d 1388, 1389. It should be noted that the Appellant, though he cites several cases establishing the right of confrontation has failed to cite any case which would allow irrelevant &

argumentative questioning in order to preserve a defendant's Sixth Amendment rights. The Appellant was not prejudiced by the court's rulings; counsel was allowed to rephrase his questions and should have introduced additional evidence rather than commenting on matters not in evidence (R. 40,127).

The trial court, therefore, correctly sustained certain objections since counsel's form of questioning was improper. The Court did not abuse its discretionary powers.

CONCLUSION

Appellant's allegation that he requested to take depositions and that such request was denied is an unsubstantiated claim. The record does not support the existence of any request, motion and/or denial of a motion. Furthermore, the Appellant has not shown why the alleged depositions were needed or that the failure to take them prejudiced his case. Therefore, Appellant's contention that his request to take depositions was improperly denied is without merit. It is not properly before this Court and should not be considered.

The trial court correctly refused to allow Appellant's counsel to argue the case through improper cross-examination of an adverse witness. The trial court did not abuse its discretionary powers since irrelevant and argumentative forms of questioning are not protected by the right of confrontation.

For the above stated reasons, Respondent urges

this Court to affirm the conviction rendered in the court
below.

Respectfully submitted,

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