1980

The State of Utah v. Carl Wilkerson : Brief of Defendant-Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE
STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent, v. CARL WILKERSON, Defendant-Appellant.	Case No. 16577

BRIEF OF DEFENDANT-APPELLANT

REVIEW OF DECISION AND JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH, ON A CHARGE OF INDECENT SEXUAL ABUSE, BEFORE THE HONORABLE KENNETH G. ANDERTON, DISTRICT COURT JUDGE PRO TEM ON APPOINTMENT BY THE HONORABLE J. ROBERT BULLOCK, PRESIDING JUDGE OF THE FOURTH JUDICIAL DISTRICT COURT.

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STATUTES CITED

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from one of the two cases tried before the same judge on the same day, Circuit Court Judge Kenneth G. Anderton sitting as district judge pro tem. This case was tried on the same day consecutively and involved the same parties as case number 16576 under separate brief.

This case charged a violation of 76-5-404, Utah Code Annotated 1973, as amended, charging indecent sexual abuse with the same person as in the related case of forcible sodomy, said offense alleged to have occurred on the 15th day of September, 1977.

The other case, a charge of forcible sodomy with a person under the age of fourteen years, alleged to have occurred on or about the 24th day of February, 1978.

The preliminary hearings on both cases were held jointly. Motions for change of venue and to quash, together with memorandums thereon, with joint assignment of the cases by the Presiding Judge of the Fourth District to Judge Kenneth G. Anderton were joint, however, the trials were held on the same day but consecutively one after the other. The court took both matters under advisement; later, but on the same date, in each case denied defense counsel's motions based on the purported victim's competency and found defendant guilty on separate documents which were identical other than the number of the case.

The court sentenced defendant to the statutory five years to life on the forcible sodomy and zero to five years on the indecent sexual abuse, to run concurrently with the sodomy; referred the defendant to the Department of Corrections for a ninety-day evaluation and subsequently referred him for a further ninety-day evaluation.

The court makes no findings other than the competency of the child; no findings as to time, place, or other factual bases. The sentencings were together, however, when notices of appeal were filed and the motions for certification of probable cause a certification of the record were made as to both cases the Clerk of the District Court filed the transcript of preliminary hearin and a portion of the motions in case number 16577 and filed the balance of the motions in case number 16576, making it necessary to consider the two cases together in order to do substantial justice. Although the cases are separate, the preliminary hearin were together, all motions and orders prior to trial were filed jointly and both appeals certified upon records were left incomp

The parties in each case and the principal witness are th same.

It is pointed out that when the Clerk of the District Co for Vernal County transferred the records and numbered the recor sheets that she left some documents out in each case, said documents to be found in the other case. The important portions of these are motions to quash and motions for change of venue, toget

with the transcript of the preliminary hearing found at R.015 to R.068, in case number 16577, those matter not being filed at any place in case number 16576.

The writer is filing two briefs. In each case the Statement of Facts is different, not as to references to the trials at the district court level, but as to references in each case to other portions of the file, to wit, references to the preliminary hearing and the motions to quash, to vacate, and the rulings thereon, are carrying record reference numbers from case number 16577. In those instances where references are used in case number 16576, an asterisk will be added.

RELIEF SOUGHT ON APPEAL

Defendant requests a reversal and dismissal on each case or, in the alternative, reversal and remand for a new trial with directions.

STATEMENT OF FACTS

(The references herein are to the record in case number 16577 of the joint preliminary hearing.)

The statement of facts as to each case will be stated separately, however, references to the record will refer to the same preliminary hearing transcript by different record numbers as the same preliminary hearing transcript differs as to record numbers in each file.

Defendant was charged on the 5th day of June 1978, in the Justice Court of Duchesne County; C. Dean Powell, Justice of the Peace, presiding, with a violation of 76-5-403, a first degree felony alleged to have occurred on the 24th day of February, 1978 (R.2) and an act or charge of forcible sexual abuse alleged to have occurred on the 15th day of September, 1977. Both offenses are alleged to have taken place in the defendant's residence in Duchesne County, State of Utah.

Preliminary hearing was heard by Justice of the Peace Powell with Rex J. Hanson representing defendant.

Nicole was the only witness other than two pages of testimony by Robert May, her stepfather, a pages 53-4.

Nicole testified that she was six years of age (R.27) that her birthday was July 7th (R.27); and that she was in the first grade at school. She didn't know what grades she got in school; she didn't know what it meant when she held up her hand in front of the judge (R.28); she didn't know the difference between right and wrong (R.28-9); she didn't know why it was wrong to tell a lie (R.29); she didn't know what it was to tell a lie or tell the truth (R.29), and at R.52, on question by Mr. Hanson, she testified:

> "Q. Did your Mom ever tell you what to say when you got here today?
>
> A. Yes."

She testified at trial in district court on June 6th that she was almost eight (R.124); that her birthday was July 27th, as distinguished from July 7th (R.24); that she went to school and was in the first grade (R.24), and then changed her testimony to the second grade (R.25); that she got good grades (R.125); that her teacher was Miss Johnson (R.125), where she had testified under oath a few hours previously that her teacher was Miss Galloway and that she was in the first grade and, when asked who her first grade teacher was, she didn't respond.

She testified that she know what it meant to tell the truth (R.127) and that she knew the difference between the truth and a lie (R.127) and that the difference was that the truth is "when you are telling the truth and lying is when you are making up a story"; that it is wrong to tell a story; all this in direct contradiction to the testimony before the justice of the peace eleven months earlier.

Thereupon, Mr. Draney submitted Nicole as a competent witness and the court reserved its ruling as it had in the earlier case.

At this point, due to separate hearings, the Statement of Facts moves to Case No. 16577.

Statements made by Nicole at preliminary hearing have already been set forth.

On June 6, 1979, in District Court, Nicole testified that she was almost eight (R.064); that her birthday was July 27th (R.065), as distinguished from an answer to the same question at preliminary hearing as being July 7th; that she went to school and was in the 1st grade (R.065), and then changed to the second grade (R.067-068); that she got good grades (R.065); that her teacher was Miss Johnson, although she had previously testified that her teacher was Miss Galloway.

She testified that she knew what it meant to tell the truth (R.066); that if you lied you got in trouble (R.066); she remembered Mr. Draney questioning her at preliminary hearing, but didn't remember what her answers were on each question where she had indicated she didn't know the difference between right or wrong or what it meant to tell a lie.

She found out what it meant to tell a lie and tell the truth in the second grade; she didn't know in the first grade. She had never been in trouble nor been spanked for telling a lie, although she admitted she did tell lies (R.070).

With this background, the court refused the County Attorney's request to make a ruling on the competency of the child (R.072).

She thereafter testified that he (the defendant) put his finger "where she went to the bathroom" in the front room on the couch under an afghan (R.074). (At preliminary hearing she testified that it was under a blanket in the bedroom, then under a blanket in the family room [R.39 and 40*]). When asked how many times he put his finger there, she didn't remember.

She said the incident happened in 1978 "just after summer" (R.076); (the preliminary hearing was held in July of 1978 and the initial complaint brought in June of 1978 (R.0211).

When asked how long she had been at her father's place, she said "I think about a week or three--or three days" (R.079); when asked how often she visited her father, her answer was, "Once a week, sometimes" (R.079). When asked the question, "How long do you stay?" her answer was "three days" (R.079).

On cross examination, Nicole admitted that at preliminary hearing she had testified it happened on the bed in granddaddy's room (R.079) and that on the day she sat on a couch in the front room her grandma was in the same room in a chair (R.079-080).

Again, she admitted that she said at preliminary hearing "a blanket on the bed, instead of an afghan on the couch (R.081 When she claimed that he touched her, she doesn't remember whether anyone said anything; she remembers no details (R.082-0 Her grandmother was there all of the time (R.085).

When asked if her grandmother said anything to her grandfather, she didn't know (R.085*); she repeated that it happened "right after summer" in 1978 (R.085); she couldn't remember whether she missed any school (R.085).

She went to her father's, "I think I went a week" (R.086 she couldn't remember how long she was with her grandfather and grandmother (R.086).

At R.090 she again testified that she knew this year was 1979 and restated that the things that happened on the couch were in 1978 "right after summer" for the third time. It is stated again that the complaint and preliminary hearing were pri to that time (R.1 and R.2).

Mr. Robert May was called as a witness and testified that Nicole spent the summer of 1977 and 1978 with her natural father. When asked if he knew if she had spent any time in the summer or fall of 1977 with her grandparents, he answered, "I don't know that."

There was no further testimony for the State and the State rested.

For the defense, Mrs. Donna Wilkerson testified at R.99 as follows: She is the wife of the defendant (R.107); that she is the grandmother of Nicole (R.109); that there was no time during the prior two years when Nicole, after a bath, had been sitting on her grandfather's knee under an afghan, nor had she been in the presence of Nicole and her husband at any time when he touched her indecently or did anything she would consider unusual (R.111).

There was no cross examination.

The defendant testified he was the grandfather of Nicole and at no time had he touched her improperly (R.113).

On cross-examination, he denied that at any time he made a statement that he had a problem and was getting help for it, however, he did make a statement to the effect that if Nicole needed any treatment that he would pay for it (R.0114).

Deputy Horrocks testified on rebuttal that at one time Mr. Wilkerson called him to a meeting where he said something about his having been to a psychiatrist (R.0117-0118).

Defense counsel moved for a directed verdict, which was taken under advisement by the court.

ARGUMENT

POINT I

THE COURT ERRED IN ALLOWING NICOLE TO TESTIFY AS THERE WAS INSUFFICIENT FOUNDATION AS TO HER COMPETENCY TO THE POINT HE ABUSED HIS DISCRETION.

Section 78-24-2, Utah Code Annotated provided:

> "(2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly" cannot be witnesses.

The case law properly holds that discretion is in the trial judge as trier of the law to rule on competency by not the age of the child, but the child's mental capacity, the condition factors; that it is the court's duty to adequately qualify the witness. See State v. Taylor, 21 Utah 2d 425; 446 P.2d 954, page 955:

> "[2] The two girls were not adequately qualified as witnesses. Their awareness as to the difference between right and wrong and understanding of telling the truth as against a lie was not sufficiently established. In other words, their competency to testify was not established." (Citing State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965).

Continuing with the Taylor citation, it does not appear from the record that:

"...an appropriate objection was made to the witnesses' competency. A survey of the record casts grave doubt upon the ability of S to understand questions without a cue from the prosecutor as to the desired responses. For example:

Q. [by prosecutor] ...But you won't lie heretoday. Is that right? You know this is very important that you don't lie, don't you? Tell the whole truth today and not add anything to it. Say the answer. No. Say I won't. [Emphasis added.]

A. I won't

When the defense attorney interrogated S, he asked:

Q. Do you know what a lie is, S?

A. No.

During the direct examination of the younger child, C, the prosecutor instructed her response seven times, in addition, to his obvious cues to elicit the desired answers.

A careful survey of the record compels one to conclude that the older child had no independent recollection of the matter from her responses to the questions. If one deletes her answers to leading questions which contained obvious cues as to the desired response, her testimony is limited to 'I don't know,' and 'I don't remember.' Furthermore, from the extremely limited testimony on the subject matter, there emerges a serious doubt as to whether the children had any sense of moral duty to tell the truth. The sole sanction with which they were familiar for relating a falsehood was a reprimand by their stepfather, the defendant, with whom they no longer lived"

The above cases are cited due to similarity in the factual situations. In both cases, as with this case, the testimony of the infants, two girls in the Taylor case, and Nicole in this case, constitute the sole evidence against the defendant.

In both cases there is little evidence to show that the witnesses had an understanding of telling the truth and there is

an entire lack as to both girls in the Taylor case and Nicole in this case of having a sense of moral duty to tell the truth. In this case the trial judge was aware that Nicole had testified at preliminary hearing that she did not know the difference between what it was to tell the truth or to tell a lie (R.29*); that she didn't know what it was to hold up her hand before the judge; she didn't know the difference between right and wrong (R.29) and further and more important at R.52 from the preliminary hearing transcript the following language:

> Q. (By Mr. Hanson): And did your Mom ever tell you what to say when you got here in court today?
>
> A. Yes.

Followed by Mr. Draney's question at R.53:

> Q. Nicole, you said you talked to your Mommy about these things; is that right?
>
> A. Yes.
>
> Q. Did your Mommy ever tell you about what happened or did you tell her what happened?
>
> A. I can't remember.

The transcript of the preliminary hearing was before the trial judge as Exhibit "A" when he denied a thoroughly briefed motion to quash based on Nicole's testimony (See R.14*) through R.70*). The judge was also aware of the testimony to qualify her as a witness at trial (R.64 to R.70), where she testified that she was in the first grade last year, which is the same as the testimo

eleven months before at preliminary hearing (R.65); she had to be corrected to answer that she was in the second grade (R.69); that she had no memory of her answers at preliminary hearing to Mr. Draney's questions as to the difference between truth or lies.

The judge was also aware that she was cognizant that she had testified at preliminary hearing that the act constituting the crime happened in the bedroom in her grandparents' home but that at trial it happened on the couch in the front room with her grandmother sitting in the chair in the same room (R.81).

At the end of the State's attempt to qualify Nicole, the judge stated:

> "...I'm not going to make any formal decision as to her competency at this time" (R.072),

but took the matter under advisement and didn't rule until his final decision on guilt or innocence (R.102-103), wherein he points out the child's difficulty in remembering time sequences and her frequent pauses which he attributes to the "tender age of the child" and the lapses of time and the difficulty of the subject matter. The one affirmative point in the decision was "the evidence indicated she was a good student in school" (R.102).

The only evidence in the record as to her grades is at R.65:

> "Q. What kind of grades did you get in school this last year, Nicole?
>
> A. Good grades."

It must be remembered here that she was confused as to what grade she had been in last year, having answered "the first grade"

at R. 65 and then changed to "the second grade" at R.68. She was also confused as to what teacher she had in which grade.

When questioned as to her grades at preliminary hearing, she had no memory as to what kind of grades she got (R.28). The child had no relationship to the time period in which she indicates that the instant charge took place, answered at R.76: "Just after summer", and at preliminary hearing that she didn't know what time of the year it purportedly happened (R.37*).

Nicole also testified that this happened the first time in 1978 (R.76) "Just after summer", and then again at R.85 "--right after summer in 1978"; then at R.90 in cross-examination she answered the following question:

"Q What year is it?

A 1979.

Q And you said that this matter that happened to you on the couch at your grandfather's was in 1978, is that right?

A Yes.

Q Are you sure of that?

A Yes."

The initial complaint is dated June 5, 1978 (R.2) and the preliminary hearing was held on July 11, 1978 (R.16), both preceding the period the witness is talking about.

POINT II

THERE IS NOT SUFFICIENT EVIDENCE TO MAKE A DETERMINATION OF THE DEFENDANT'S GUILT TO THE REQUIRED DEGREE OF GUILT BEYOND A REASONABLE DOUBT.

This case is a criminal case charging a felony. The State's burdon of proof is "beyond a reasonable doubt".

The writer has set forth the testimony of Nicole and the findings of fact in detail and has discussed that testimony with record citations. The record shows that the only additional evidence the State put on is the testimony of the stepfather, Robert May, for two pages at R.54 and R.55* in the preliminary hearing and at R.95 and R.96 at the trial, a fair summary of those pages being that he couldn't place Nicole at her grandfather's (the defendant's) home at any time although she did spend both the summer of 1977 and 1978 at her father's home and he, the witness, was at Lake Powell during the second or third week of September in 1977 and he could not place Nicole's whereabouts at that time.

For the defense, Mrs. Donna Wilkerson testified (R.110-111) that she is the wife of defendant and the grandmother of Nicole; that she had seen the grandfather and grandchild together many times; that she at no time had seen them sitting on the couch in the living room at the same time with an afghan over them.

The defendant testified at R.112-113 denying any improper conduct with Nicole at any time. On cross-examination he denied making a statement that he had a problem and was getting help for it.

It must be pointed out that more detailed denials cou not be made because the information was couched in the language that the alleged criminal act occurred on or about September 15, 1977. There was never any evidence placing the alleged crime a that time, or at any other date or period of time, the only evi- dence being that the crime took place, if it did take place, "a after summer" in 1978.

POINT III

THERE IS NO TIME FRAME TO PROTECT THE DEFENDANT OR TO MAKE A JEOPARDY ON EITHER THE FINDING OF GUILTY OR NOT GUILTY.

As previously pointed out, the court took both this c and its companion case under advisement as to both consider the guilt and innocence and the question of competency of the witne and made decisions in both cases on the same date, July 23, 19 which are identical except for the case number. There are no findings of fact or conclusions of law or statements as to wha time, if any, the crimes were proved.

The statements of Nicole as to sexual abuse varied o a period of more than a year. In the forcible sodomy case, the complaint and information indicated "on or about the 24th day o February". There is no evidence, other than Nicole's testimon placing her in Duchesne in February, her testimony being tha the alleged crime was "before Christmas" and her stepfather's testimony fails to show that she was in Duchesne at any time relative to Christmas, either before or after.

The writer has reviewed carefully the cases involved in the question of competency. See State v. Blythe, 20 Utah 378, 58 P.1108 (1899); State v. Morasco, 42 Utah 5, 128 P.571 (1912); State v. MacMillan 46 Utah 19, 145 P.833; State v. Zeegich, 61 Utah 61, 210 P.927 (1922); State v. Smith, supra, 16 Utah 2d 374, 401 P.2d 445 (1965), in re Donnelley v. The Territory, 5 Ariz. 291, 52 P. 398.

In each case the court places emphasis on the ability of the child to preserve and understand the meaning of an oath; to have the moral sense to appreciate the difference between right and wrong; also, in each of those cases there was competent evidence to support the testimony of the child, for example, in State v. Smith, supra, the evidence shows a mother finding doors locked and seeing through a window the child and the defendant lying on a bed. It would appear the Utah case, State v. Taylor, supra, controlled in this matter wherein the court was held to have abused its discretion in allowing testimony of a child under the age of ten and it should be pointed out that in that case there were two children, ages seven and eight, and not just one six-year old child.

Additionally, we agree that while the date alleged in the information may vary within the statute of limitations, it is necessary for the State to prove beyond a reasonable doubt an offense on some date that will constitute jeopardy for the defendant after trial, regardless of conviction. Here there is no such date.

CONCLUSION

In closing, we ask special consideration, together with the rest of the record, on the six-year old's statement at R.52, line 18, et seq:

"Q. And did your Mom ever tell you what to say when you got here in court today?

A. Yes.

MR. HANSON: I think that's all I have, Your Honor, I realize she is a little girl. She is getting tired."

REDIRECT EXAMINATION

BY MR. DRANEY:

Q. Nicole, you said that you talked to your Mommy abo these things; is that right?

A. Yes.

Q. Did your Mommy ever tell you about what happened or did you tell her what happened?

A. I can't remember."

Respectfully submitted,

SUMNER J. HATCH
Attorney for Defendant

MAILING CERTIFICATE

I certify that on the 18th day of January, 1980, two copies of the foregoing Brief of Defendant-Appellant were mailed to Mr. Robert B. Hansen, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, and a copy was mailed to Mr. Dennis L. Draney, Duchesne County Attorney, P. O. Box 1886, Roosevelt, Utah 84066, postage prepaid.

SUMNER J. HATCH