1981

the State of Utah v. Selmar Ray Purcell : Brief of Appellant

Utah Supreme Court

LYNN R. BROWN; Attorney for Appellant;DAVID WILKINSON; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	
v.	:	
SELMAR RAY PURCELL, Defendant-Appellant	:	Case No. 16783

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of escape from the Utah State Prison in the Third Judicial District Court in and for Salt Lake County, State of Utah the Honorable Dean E. Conder, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, SELMAR RAY PURCELL, appeal from a jury verdict of guilty of escape in the Third Judicial District in and for Salt Lake County, State of Utah the Honorable Dean E. Conder, presiding.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty of escape and sentenced to imprisonment in the Utah State Prison for the term provided for by law.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the conviction and judgment and an order directing the case to be remanded to the Third Judicial District Court with directions to have a new trial.

STATEMENT OF FACTS

On June 24, 1979 the appellant and two other inmates walked away from the Utah State Prison (T.95, 114-117) all three inmates were apprehended within hours in the Granger area of Salt Lake County (T.123). About a month prior to this incident the appellate had been attacked by several other prisoners and had received a number of stab wounds in his back and chest area and his legs (T.193, 208-209, 222, 248-9). Although the appellant did not officially report the incident for fear of reprisals by the inmates he did report it to Mr. Chavez, one of the counselors at the Utah State Prison. (T.124-5) In addition the appellant asked to be removed from the section of the prison where the attack took place (T.233). At the time of the trial the appellant and other witnesses testified that he was continuously afraid for his life after the stabbing incident (T. 184, 226-7). The appellant further testified that having failed to be transferred on request and being afraid that if he officially reported the attack he would suffer reprisals, it was his intention to attempt an escape so that he would be transferred to the maximum security block which is the usual penalty for attempted escape (T.227-8, 241). The appellant testified that it was his intention from the beginning that after making good his escape he would then turn himself in to the authorities (T.264). During the course of the trial the appellant requested a continuance to compel the attendance of Mr. Chavez who had been subpoenaed but failed to appear (T. 215-7). [illegible] the

only defense witness that was an official at the Utah State Prison with direct knowledge of the stabbing of the defendant (T.224-5). The trial judge ruled that such testimony would only be cumulative and refused to grant the continuance (T.275). At the close of the trial the judge refused all of the appellant's requested jury instructions on compulsion and verbally instructed the jury from the bench as follows:

> Ladies and gentlemen of the Jury, I propose to submit this to you for your determination. Before I do, however, I'm going to strike the testimony that has been received here in Court about any threats or coercion upon the defendants causing them if they did decide to leave the prison, that testimony I don't think is applicable to the case. And you are admonished to disregard it. . . (T. 268)

The appellate took proper exception to the refused instruction (T. 274).

During the second day of trial at the end of the afternoon recess the court on its own motion cleared the courtroom of all spectators, locked the courtroom doors and placed two extra sheriff's deputies inside the courtroom (T.244-245). A motion for a mistrial was made and joined in by all the parties on the grounds that the closing of the courtroom denied the appellant the right to a public trial as guaranteed by the constitution of the United States and the State of Utah. (T.257).

POINT I

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON COMPULSION AS REQUESTED BY THE APPELLATE AND COMPEL THE ATTENDANCE OF A WITNESS FOR CORROBORATION.

Utah Code Ann. §76-2-303 (1953 as amended) provides:

Compulsion - (1) A person is not guilty of an offense

> when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situtaion would not have resisted.
> (2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

At the trial the appellant testified that he was compelled to leave the prison because he was in fear for his life. This contention would have been corroborated by Mr. Chavez, an employee at the Utah State Prison, but Mr. Chavez failed to appear when subpoened and the trial court refused to allow time to compel his attendance. The trial court's exclusion of the only non-prisoner witness for the defense Mr. Chavez seriously compromised the corroboration of the defendant's case. The right to present all competent evidence in his behalf is inherent in the Due Process guarantees of a fair trial. In Re Oliver, 333 U.S. 257, 92 L.Ed 2d 682, 68 S.Ct. 499 (1948).

In the case of United States v. Bailey, __ U.S. __ 62 L.Ed. 575, 100 S.Ct. ____ (Jan 21, 1980) the United States has considered the defense of compulsion in escape cases. In the Baily case the Supreme Court recognized the defense of compulsion provided it is demonstrated that the only reasonable alternative was to escape and that a bona fide effort to surrender or return to custody is made. Even though the Supreme Court recognized the defense of compulsion in an escape case the Instruction on compulsion was not appropriate because the defendant was out of custody a month or more and there was no

evidence of any intent to return. In the present case the defendant was recaptured within a short period following his escape and he testified in court that he intended to turn himself back into the prison authorities in order to receive a different custodial treatment at the prison.

In the case of United States v. Boomer, 571 F.2d 543 (10th Circuit 1978) the defendant was tried and convicted in the federal court for attempted escape. The defendant admitted his attempted escape but contended that he was coerced into leaving the prison from a long history of abuse and mistreatment at the hands of both the prison officials and fellow inmates. The 10th Circuit affirmed the conviction holding that the trial court properly instructed the jury and that the defense of coercion did not excuse escape unless there was no time for a complaint to be made or unless such a complaint would have been futile. The court also held that the prisoner must have intended to report immediately to the proper authorities upon obtaining a position of safety. New Mexico in a recent Supreme Court decision recognized the defense of compulsion in a fact situation very similar to those presented in the instant case. Esquibel v. State, 576 P.2d 1129 (N.M. 1978). The New Mexico Supreme Court, noting that duress or compulsion is historically a widely recognized defense to escape stated:

> Defendant successfully raises the defense of duress when he presents evidence . . . from which a jury can conclude that he feared immediate great bodily harm to himself or another person if he did not commit the crime charged and that a reasonable person would have acted in the same way under the circumstances. The defendant thus having established a prima facia case of duress (compulsion), the burden then shifts to the State to prove beyond

a reasonable doubt that the defendant did not act under such reasonable fear. 576 P.2d at 1132.

The Esquibel court held that in view of a prolonged history of beatings and serious threats, the most recent having occured 48 to 72 hours before the escape, the defendant was entitled to an instruction on duress. The compulsion in the instant case was at least as serious as in the Esquibel case since Purcell had received a number of stab wounds.

In the case of State v. Horn, 566 P.2d 1378 (Hawaii 1977); the Hawaii Supreme Court reversed a lower court conviction for not instructing the jury on the question of compulsion. The defense offered evidence of a history of violence among the prisoners and a refusal or inability of prison officials to guarantee security and safety in a particular cell block. The Supreme Court in the Horn case held that if competent evidence going to the defense of compulsion was presented then the jury should have been instructed on that question.

In a Florida case the Supreme Court reversed a lower court for its failure to permit the defendant to establish a defense where he contended that he escaped to avoid sexual advances and threats of sexual battery. Lewis v. State, 318 S. 2d 529 (Florida 1975). The Supreme Court in the Lewis case stated that if the defendants proffered evidence were true he would have a valid defense insofar as it might establish a lack of willful intent to avoid lawful confinement or at least create a reasonable doubt. The defendant claimed he escaped for the purpose of reporting the threats to the circuit judge.

The Lewis case is directly in point with the instant case in that Purcell testified that he escaped for the purpose of turning himself in so that he would be placed in maximum security custody.

The Michigan Supreme Court in the case of People v. Luther, 232 N.W. 2d 184 held that duress is a well recognized defense and could excuse a defendant from criminal responsibility in an escape case. In the Luther case the Supreme Court held that duress is a jury question that is successfully raised when evidence is presented from which a jury could conclude;

> (a) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> (b) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> (c) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> (d) The defendant committed the act to avoid the threatened harm.

The defendant in the Luther case testified that he had been confronted earlier in the day by six assailants who made homosexual demands on him, knocked him down and made threats with a knife.

A defendant in a Kentucky case failed to specify the names of his attackers when he escaped claiming he was unable to pay a gambling debt. Pittman v. Commonwealth, 512 S.W. 2d 488 (Kentucky 1974). The defendant's testimony was that four prisoners confronted him and demanded the

money or homosexual acts. The court merely instructed the jury that if they believed beyond a reasonable doubt that Pittman escaped they should find him guilty. The Kentucky Supreme Court applied a standard of compulsion as:

> "The present imminent and impending danger of such a nature as to induce a well grounded apprehension of death or serious bodily harm if the escape is not made."

The court in Pittman held that the jury instruction was prejudicial because relevant evidence proffered by the defendant was excluded from the jury's consideration.

If the defense of compulsion is raised it is then the State's responsibility to convince the jury beyond a reasonable doubt that the escape was not the product of duress. People v. Field, 184 N.W.2d 551 (Michigan 1970).

It is the appellant's contention that he sufficiently raised the issue of compulsion that the jury should have been instructed on that issue. The effect of not giving the jury instruction was tantamount to a directed verdict since there was no denying the fact that appellant left the prison.

POINT II

CLOSING THE APPELLANT'S TRIAL BASED ON UNSUBSTANTIATED INFORMATION DENIED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

The Sixth Amendment right to a public trial has been guaranteed to State criminal defendant through the Due Process Clause of the Fourteenth Amendment, In re Oliver, 333 U.S. 264 (1947). The relevant portion of the Sixth Amendment to the

United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." Almost the same language is found in Article I, Section 12 of the Constitution of the State of Utah and in Utah Code Ann. §77-1-8 (1953 as amended).

To determine if the acts of the trial court denied the appellant his right to a public trial the history and purpose of that protection should be considered. The history was succinctly described in the case of In re Oliver, supra.

> This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved before settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . " most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.
>
> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Start Chamber, and to the French monarchy's abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society the guarantee has always been recognized

> as a safeguard against any attempt to employ our courts as instruments of prosecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. [footnotes omitted] 333 U.S. 264, 266-270

The purposes of the right to a public trial were described in the various opinions in Estes v. Texas, 381 U.S. 532 (1965). In that case the court held that the public trial guarantee could not be claimed by the media as a justification for televising and broadcasting a criminal trial. Mr. Justice Clark, the author of the plurality opinion, stated that:

> . . . it is a "public trial" that the Sixth Amendment guarantees to the "accused". The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. History has proven that secret tribunals were effective instruments of oppression. 381 U.S. 532, 538-539.

Mr. Chief Justice Warren in a concurring opinion quoted In re Oliver, supra, then enumerated some other purposes of the right to a public trial:

> . . . the public trial provision of the Sixth Amendment is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly, the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. [footnote omitted] 381 U.S. 532,582

Similarly, Mr. Justice Harlan relied on In re Oliver, supra, and stated in his concurring opinion,

> The "public trial" guarantee of the Sixth Amendment which reflects a concept fundamental to the administration of justice in this country, [citation omitted] certainly does not require that television be admitted to the courtroom. [citation omitted] Essentially, the public trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. [citation omitted] A fair trial is the objective and a "public trial" is an institutional safeguard for attaining it. 381 U.S. 532,588

Due to the important nature of the purposes of a public trial and the interests which it protects, it is the subject of very few limitations. In cases decided by this court the limitations can be placed in two categories: the prevention of interference with orderly court procedures and the need to shelter certain members of the public from shocking or immoral facts. In State v. Jordan, 57 Ut. 612, 196 P.565 (1921) this court described such circumstances,

> Aside from the inherent power of every court, in rare instances, to exclude part of the public, as in such extreme areas where its presence would interfere with the due and orderly procedure in the progress of the trial, or where the testimony is of such a character as to shock the sense of decency or tend to degrade the public morals, more especially those of the young, the exclusion of the public should be, and generally is, held to violative of the constitutional rights of the accused. 196 P.565, 567.

In that case this court reversed the appellant's conviction for carnal knowledge, because the courtroom had been closed when the prosecutrix testified. In the case at bar the only question is with respect to the interference with trial procedure.

The cases from this court have not reached the question of the procedures that a trial court should employ to determine if it would be proper to close a courtroom. Recently, the Court of Appeals of New York dealt with this issue in People v. Jones, 47 N.Y.2d 409, 391 N.E. 2d 1335 (N.Y. App., 1979). In that case the prosecutor moved to close the courtroom when an undercover agent began to testify. The prosecutor represented to the court that the witness was in fear for his life. The judge closed the courtroom without receiving any further information by way of testimony or colloquy. In doing so, the court stated that it would take notice of the nature and dangers of being an undercover agent in New York City. During the course of cross examination of the agent it was discovered that the agent was no longer working undercover and was, in fact, working as a uniformed patrolman. The court stated that when a trial judge is faced with a situation where a request that the courtroom be closed is made and the defendant has objected, the trial court should use its discretion in determining if such a request is meritorious. It was suggested that in some cases it may be enough merely to question counsel, witnesses, or the spectators to reach a decision. The court went on to state:

> In other cases, the only truthworthy means of establishing grounds for excluding the public may very well be to hold an evidentiary hearing, [citation omitted] which, if the need is apparent, might be held behind closed doors [citation omitted]. In short, while there is no single rule to cover every case, no closing can be tolerated that is not preceded by an inquiry careful enough to assure the court that the defendant's right to a public trial is not being sacrificed for less than compelling reasons. 391 N.E. 2d 1335, 1339.

Because of the lack of such an interest in that case the court affirmed the order of the appellate division reversing the conviction.

In the case at bar, the courtroom was ordered to be closed and spectators were required to leave without any notice to the appellant or his counsel (T.244-245). No hearing was held nor were facts given for the record to support the court's action until the next recess when the jury was excused (T.258). At that time it was revealed by one of the guards present in the courtroom that he had received information via telephone from the Murray City Police, who had received information from a prison employee that there would be an escape attempt from the trial (T.259). Nothing was presented to establish the reliability of the information from the prison employee. There also is no indication in the record that any of the defendants had done anything during the course of the proceeding to indicate that there may be an escape attempt, nor was there any disturbance by the defendants during the proceedings. If an evidentiary hearing had been held there would be no exception to Rule 63 as required by Rule 66 of the Utah Rules of Evidence to allow such hearsay within hearsay evidence

to be admitted. Likewise, the mere assertion that one has received a telephone call from a certain party lacks foundational requirements for admissibility, see generally, State v. Merlar, 94 Idaho 803, 498 P.2d 1276 (1972).

Even if these proof problems could be overcome, the court could have used alternatives to prevent an escape or any other such courtroom disturbance other than closing the courtroom to spectators. For example, a guard could have been placed by the doors to prevent escape, or the doors could have been locked once the spectators were in the courtroom. If there was a reason to believe that some of the spectators would aid in such an escape attempt they could have been searched prior to entering the courtroom. In the alternative, any combination of these alternatives may have been used.

Because there was no compelling reason given for the closing of the courtroom in this case, nor was sufficient inquiry made to satisfactorily establish such a compelling reason, nor were other viable alternatives explored, the appellant was denied the constitutional right to a public trial as required by the Sixth and Fourteenth Amendment to the United States Constitution, and Article I, Section 12 of the Constitution of the State of Utah.

POINT III

THE SHOWING OF THE DENIAL OF THE CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL REQUIRES THE REVERSAL OF THE APPELLANT'S CONVICTION WITHOUT A SHOWING OF PREJUDICE.

Since the appellant's right to a public trial has been denied, his conviction must be reversed.

that when a defendant's right to a public trial has been denied, prejudice need not be shown on appeal for the conviction to be reversed, State v. Jordan, supra, State v. Bonza, 72 Utah 177, 269 P. 480 (1928). In those cases, the Court did not elaborate on the reasons for this ruling, however, reasons given in the case law support the necessity for such a rule.

In People v. Jelke, 308 N.Y. 56, 123 N.E. 2d 769 (N.Y. App. 1954), the Court of Appeals of New York reversed a conviction for compulsory prostitution when the trial court closed the courtroom to all spectators but friends and relatives of the accused. The court held that since the defendant's right to a public trial had been denied he was entitled to have his conviction reversed without a showing of prejudice. The reason that the court gave was,

> To plaint that such a ruling will result in reversal of a conviction of one clearly proved guilty, it is sufficient to say that the decision herein far transcends the issue of [defendant's] guilt or the disposition of this particular case. As one court has expressed it (People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998), "It is for the protection of all persons accused of crime - the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial." 123 N.E. 2d 769, 775.

In People v. Jones, supra, this rule was upheld and the court gave some other reasons for not requiring an appellant to show prejudice when his right to a public trial has been denied. The reasons that the court gave are based on those very same reasons given for the public trial protection.

See generally, Point I, supra. It is a significant safeguard against unfair trials, likewise, it enhances the public's confidence in the judicial system. The court then stated,

> The harmless error rule is no way to guage the great, though intangible, societal loss that flows from the frustration of such a goal.
>
> The practical impossibility of demonstrating prejudice faces an accused as well. Conceptionally, a member of a public witnessing a trial may discover that he possesses material information which he will then volunteer to the parties. Or, the presence of the public may have a salutary influence in deterring a witness from perjuring himself in ways that would have been difficult for the defense to counteract. To require the defendant to undertake the well-nigh impossible task of proving prejudice would render the right to a public trial illusory and beyond appellate review on that basis. 391 N.E. 2d 1335, 1340-1341.

For these reasons prejudice is implied when such a fundamental right has been violated. Consequently, due to the nature of the right to a public trial, and because the trial court's actions denied the appellant of his right to a public trial in this case his conviction must be reversed even though prejudice has not been shown.

CONCLUSIONS

The appellant is entitled to a new trial because the court failed to allow the defense of compulsion to be

considered by the jury and the court was closed to spectators contrary to the appellant's constitutional right to a public trial.

DATED this ____ day of January, 1981.

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