1981

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

Utah Supreme Court

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

IN THE SUPREME COURT OF THE

STATE OF UTAH,

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

BRIEF OF RESPONDENT

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 RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of escape, a second degree felony, in violation of Utah Code Ann. § 76-8-309 (1953), as amended, for an escape from the Utah State Prison.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and found guilty on October 29, 1979, in the Third District Court, in and for Salt Lake County, Utah, the Honorable Dean E. Conder, presiding. He was sentenced to 1 to 15 years in the Utah State Prison, to run consecutively with the sentence he was already serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmation of the judgment and sentence rendered by the trial court.

STATEMENT OF THE FACTS

Appellant asserted at trial through his own testimony and the testimony of other inmates that in the early part of June, 1979 he was housed in medium security at the Utah State Prison and was stabbed by two other prison inmates (T.193,208,209,222). After being stabbed, appellant did not seek medical treatment from prison officials; instead he treated the wounds himself with the assistance of other inmates (T.194). Appellant did not file any grievance with the prison Warden, Program Director, Board of Corrections or any other prison administrator, with the exception of Al Chavez, a prison counselor, nor did he ask to be placed in protective custody (T.225,233-235, 242-243). Rather, sometime during the three weeks following the attack, appellant merely requested that he be transferred to minimum security (T.226). The request was considered by the block classification committee. One of the members of that committee was Mr. Chavez, the counselor to whom appellant had reported the stabbing (T.233,234). The request was denied and appellant remained in medium security (T.227).

Appellant testified at trial that while he remained in medium security he was afraid of further assaults (T.226,227,229). He further testified that he and his friend, Gary Harding, were threatened by other inmates, and that reprisals would have been made if the attack had been reported (T.224,237).

On June 24, 1979, appellant and two other inmates escaped from the Utah State Prison (T.185,186,228). The escape occurred when appellant and Mr. Harding went into a room at the prison to set up chairs for a meeting. In the room there was a third inmate, Delmont Gentry; however, there were no other prisoners in the room at the time. Mr. Gentry told appellant and Mr. Harding that the door leading out of the prison had been left unlocked (T.186, 228,250). Appellant and the other inmates left through the door and effectuated their escape. There was no evidence presented at trial to indicate that at the time of the escape appellant was being threatened with injury or that there was an imminent threat of injury if he remained in Prison.

Soon after the inmates escaped, officials at the prison discovered their absence, and a search was initiated (T.95). All three inmates were apprehended about four

hours after their escape (T.230)., Mr. Harding and Mr. Gentry were apprehended at about 4000 West 3500 South in Granger (T.123), and appellant was discovered by police about one block north of that location hiding behind some bushes in front of a church (T.124,260). Appellant testified that he hid from police out of "force of habit" (T.266). Mr. Harding testified that he intended to remain out of prison until he was caught (T.252). After the three prisoners were arrested and processed they were returned to maximum security at the prison (T.230).

At trial the judge made three rulings to which appellant took exception. First, the trial judge refused to grant appellant a continuance, which was sought in order to secure the presence of Mr. Chavez at trial to corroborate appellant's testimony regarding the stabbing (T.256,275). The basis of this ruling was that Mr. Chavez's testimony would merely be cumulative (T.275). Second, the trial judge had stricken all evidence which pertained to appellant's claimed defense of compulsion and refused to instruct the jury on compulsion (T. 260,268). Third, the trial judge, towards the end of the final day of trial, had the court room closed to the public on the basis of information that he had received from the prison that appellant and the

other two defendants were planning to escape (T.244,245,258). A court official explained that he had received the information from a prison counselor, via the Murray Police Department (T.258).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO SUBMIT THE ISSUE OF COMPULSION TO THE JURY.

Appellant has never contended that he did not escape from prison. However, he asserts that the trial court erred in refusing to instruct the jury on his claimed defense of compulsion. The standard in determining whether the defense of compulsion should be submitted to a jury in escape cases varies from jurisdiction to jurisdiction. Respondent submits that under the facts of the case the trial court appropriately refused to instruct on compulsion.

Traditionally, the defense of compulsion finds application in situations where one commits a crime under the threat that he will be physically harmed by a third person if he refuses to act. In the instant case, appellant escaped from the Utah State Prison three to four weeks after he had allegedly been stabbed by other inmates (T. 193, 208,209,222). At the time of appellant's escape he was

not being threatened with imminent injury if he refused to escape. Therefore, the defense of compulsion should be unavailable to appellant because there was no specific demand made by a third party on appellant that he escape.

This approach was adopted by this Court in State v. Pearson, 15 U.2d 353, 393 P.2d 390 (1964). In Pearson an inmate, after being assaulted on several occasions by other inmates, escaped from prison purportedly to avoid further attacks. The defendant was convicted of escape, and appealed the decision, claiming that the trial court erred in failing to submit the defense of compulsion to the jury. This Court held under the then existing statute that the defense of compulsion was inapplicable where the other inmates did not order him to escape.

In 1973, the Utah legislature passed Utah Code Ann. § 76-2-302 (1953), as amended, which provides:

> (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 situation would not have resisted.

Section 76-2-302 follows the traditional view of the defense of compulsion in that a person will not be guilty

of a crime if he was coerced to commit the crime by the use, or the threatened imminent use, of physical force. There is no reason to believe that the legislature, in passing this statute, intended to extend the defense of compulsion to escapes from prison where the escapee was not ordered to escape with a concurrent threat of serious bodily injury or death if he refused. To allow the defense of compulsion to be raised under these circumstances would impose a substantial risk on society. Prisoners would be less fearful of the consequences of escaping if they knew they could raise the defense of compulsion even though they had not actually been ordered to escape. Therefore, respondent submits that the trial court properly ruled that the defense of compulsion was inapplicable in the instant case because appellant was not ordered to escape by the other prisoners (T.260).

Appellant in his brief cites a series of cases that have rejected the approach taken by this Court in Pearson and have held that the defense of compulsion may be applicable to escapes made by prisoners to avoid being attacked. There are two lines of cases cited by appellant. Representative of the first line is People v. Lovercamp, 118 Cal.Rptr. 110 (1974). In Lovercamp the court listed

five prerequisites, which had to be met before the court would be required to submit the defense of compulsion to the jury. Representative of the second line of cases is People v. Luther, 232 N.W.2d 184 (Michigan 1975) and Esquebel v. State, 576 P.2d 1129 (N.M. 1978). In these cases the courts held that if the defendant made a prima facie showing of compulsion, the defense should be submitted to the jury, even though the prerequisites listed in Lovercamp had not been met. Respondent submits that the facts of the instant case do not meet either of the above standards, and a refusal under either to submit the defense to the jury would have been proper.

In Lovercamp, supra, the court, concerned about the potential abuse of the defense of compulsion by escapees, very narrowly delineated the situations in which the defense could be raised. The court speaking of duress as necessity, held that the defense would be applicable only if the following five prerequisites were met:

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
> (3) There is no opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Id. at 115.

This position was followed by the United States Supreme Court in United States v. Bailey, 444 U.S. 380, 62 L.E.2d 575, 100 S.Ct. 624 (1980). The defendants in Bailey excaped from a District of Columbia jail and remained at large for a period ranging from one month to three and a half months. On appeal from their conviction for escape the Supreme Court held that, where a defendant charged with escape claims the defense of compulsion, he must proffer evidence of a bona fide effort to surrender or return to custody. The court also listed as an indespensible element of the defense of compulsion the fact that the threat of harm which provoked the escape must be imminent, and the defense will fail if the defendant fails to take advantage of a reasonable legal alternative.

Application of the facts of the case to the standard set out in Lovercamp and Bailey establishes that the judge properly refused to submit the defense of compulsion to the jury. First, at the time of the escape there was no

threat of physical force being imposed on appellant (T.186, 228,250). Appellant testified that during the period following the attack he was threatened with injury if he reported the incident to the officials, but beyond this there is no evidence that any other inmates intended to injure appellant. General threats of injury, to occur at some unspecified time in the future, would not justify escape under Utah Code Ann. § 76-2-302, or under the Lovercamp standard because the threat was not imminent.

Appellant also failed to meet the second prerequisite of taking a reasonable legal alternative to escape. While appellant claimed that he asked to be sent to minimum security, the making of this request alone clearly would not meet this requirement. The request is equally explainable for other reasons such as mere desire for less restrictive custody. Moreover, minimum security would in fact, provide greater potential exposure to attack because of the reduced level of custody and control. Petitioner also failed to officially report the attack. He did not ask to be placed in protective custody, nor to be transferred to maximum security. Had he done this his problem may have been resolved without the need for escape.

Finally, appellant failed to meet the third requirement of reporting to the proper authorities once he escaped from prison. In this case, appellant had been out of prison for four hours when he was apprehended. During this time he made no attempt to contact the authorities. Further, when the police arrived on the scene he did not go to them and explain the situation; instead he tried to elude the police by hiding from them (T.266). Respondent submits that appellant should not benefit from the fact that he was quickly apprehended, by claiming that he intended to call the authorities, but did not get a chance.

Appellant has also cited a second line of cases which has taken an approach different than that of Lovercamp and Bailey. Representative of this line of cases is People v. Luther, 232 N.W.2d 184 (Michigan 1975). The court in Luther held that the defense of compulsion should be submitted to the jury if from the evidence presented by the defendant the 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.

Id. at 187.

Even under the approach taken in Luther the trial court in the instant case was justified in not submitting the defense of compulsion to the jury. Appellant in this case failed to establish that the fear of injury was operating on his mind when he made his escape. The facts show that appellant and Mr. Harding went into a visiting room in the prison to set up chairs for a meeting (T.228). In the room they encountered Mr. Gentry, who told them a door leading out of the prison was open. The three went out the door and escaped. Appellant testified that at the time of his escape he was still very fearful, and that he acted out of fear in escaping. However, at the time the escape was made no one was in the room threatening appellant, nor did appellant produce any evidence to show that he was subject to an imminent threat of attack. The evidence presented only established that he had purportedly been warned by other inmates that reprisals would be taken if he reported the stabbing. Respondent submits that there was only a general threat of attack, which might occur somtime in the future, and therefore, appellant did not establish that at the time of his escape

there was threatening conduct by other inmates sufficient to create in the mind of a reasonable person the fear of death or serious harm.

In conclusion, respondent submits application of the facts of the instant case to any of the above approaches establishes that the trial court did not err in refusing to submit the defense of compulsion to the jury. Moreover, the determination of whether the defense should have been submitted to the jury should properly be decided under Pearson, 15 U.2d 353, 393 P.2d 390 (1964). In the alternative respondent submits that of the two alternate approaches, the process taken by courts in Lovercamp and Bailey is the better reasoned approach. Bailey recognizes the risk to society in allowing this defense to be raised by escaped prisoners and provides certain safeguards to limit those risks. In addition, the approach taken by the Supreme Court in Bailey is more in line with the approach taken by this Court in Pearson.

POINT II

THE TRIAL COURT PROPERLY REFUSED TO GRANT A CONTINUANCE, AND COMPEL THE TESTIMONY OF MR. CHAVEZ.

During the course of the trial, appellant requested a continuance in order to locate Mr. Chavez to

testify as a defense witness regarding the earlier stabbing. The trial judge denied the request on the basis that the testimony would be cumulative (T.275). Appellant's right to present competent evidence at trial is subject to the trial judge's discretion to exclude admissible evidence if the judge finds that the probative value of the evidence is substantially outweighed by the risk that its admission will cause any of the following problems:

> (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered.

Rule 45 of the Utah Rules of Evidence.

In this case, numerous witnesses testified that appellant had been stabbed, and that he was fearful of further violence after the incident occurred (T.193,209, 222,248). Appellant sought to have Mr. Chavez testify to further corroborate the fact that appellant had been stabbed (T.256). In view of the fact that it had been firmly established that appellant had been stabbed the probative value of this additional testimony was outweighed by the risk that a great deal of time would be consumed in granting a continuance to secure the presence of

Mr. Chavez at trial. Therefore, the evidence was properly excluded as cumulative.

However, even if the exclusion of Mr. Chavez's testimony was error this would not be a basis for a reversal of appellants conviction. Rule 5 of the Utah Rules of Evidence provides:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless (a) it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers, and (b) the court which passes upon the effect of the error or errors is of the opinion that the excluded evidence would probably have had a substantial influence in bringing about a different verdict or finding.

In the instant case the trial court properly ruled that the defense of compulsion was inapplicable in this case. Even if Mr. Chavez's testimony had been admitted it would have been stricken with the rest of the testimony regarding the defense of compulsion. Therefore, the evidence would not have had a substantial influence in bringing about a different verdict.

POINT III

THE PETITIONER RECEIVED HIS SIXTH AMENDMENT RIGHTS TO A PUBLIC TRIAL BECAUSE THE CIRCUMSTANCES JUSTIFIED CLOSING THE COURTROOM.

The right to a public trial is guaranteed to a criminal defendant in the Sixth Amendment of the United States Constitution and in Article I, Section 12 of the Utah Constitution. However, the right to a public trial is not absolute, nor is it a "limitless imperative." Lacaze v. United States, 391 F.2d 516, 521 (5th Cir. 1968). The purpose of the Sixth Amendment public trial requirement is to guarantee that a defendant will be fairly dealt with and not unjustly condemned. In Re Oliver, 333 U.S. 257, 92 L.Ed 682, 68 S.C. 499 (1948). An accomodation must be made of an individual's right to a public trial and the interests of society which might justify the closing of a courtroom to the public. United States ex rel. Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.), cert. denied, 423 U.S. 937 (1975); United States v. Eisner, 533 F.2d 987, 993 (6th Cir.) cert. denied, 429 U.S. 919 (1976).

The right to a public trial has been interpreted as being "subject to the trial judge's power to keep order in the courtroom" United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965). A judge has the inherent

power to preserve order and decorum in the courtroom, and in the exercise of that power he may remove spectators from the courtroom without infringing on an accused's right to a public trial. United States v. Kolbi, 172 F.2d 919 (3rd Cir. 1949). The trial judge in a criminal case, upon the development of a situation indicating that armed or open violence may be attempted against those participating in the trial, may take necessary precautions to avoid such situations. People v. Santo, 43 Cal.2d 319, 273 P.2d 249 (1954), cert. denied, 348 U.S. 959 (1955). In People v. Jones, 157 Cal.Rptr. 51 (1979), the judge in a juvenile proceeding ordered a search of the defendant to be made based on information that had been communicated to him by the court baliff. A social worker had told the baliff that during an interview she had had with the defendant he had brandished a gun and threatened to kill anyone who tried to take his child. During the search a small dagger was found on the defendant.

In a subsequent proceeding the defendant was tried for carrying a concealed weapon. In this proceeding the defendant challenged the right of the trial court to make the search. The Supreme Court of California held:

> [t]he superior court had both the statutory and inherent power (see

> Hawk v. Superior Court, 42 Cal.App.3d 108, 126-127, 116 Cal.Rptr. 713 [cert. den., 421 U.S. 1012, 95 S.Ct. 2417, 44 L.Ed.2d 680]), and duty, "'to preserve the order of the court and to see to it that all persons . . indulge in no act or conduct calculated to obstruct the administration of justice'" (People v. Merkouris, 46 Cal.2d 540, 556, 297 P.2d 999, 1010), and "to take whatever steps were necessary to see that no conduct on the part of any person obstructed the administration of justice" (People v. Santo, 43 Cal.2d 319, 331, 273 P.2d 249, 256 [cert. den., 348 U.S. 959, 75 S.Ct. 451, 99 L.Ed. 749]). That power and duty patently extended to the prevention of threatened courtroom violence reported, as here, by an officer of the court of her own knowledge. Id. at 53

In United States v. Eisner, supra, the Sixth Circuit Court of Appeals reviewed the propriety of excluding spectators from the courtroom during the testimony of a government witness because of her fear of testifying before those present in the courtroom. This fear could not be substantiated by the trial court. Nevertheless, the courtroom was cleared and the trial court's order was upheld by the appellate court. The appellate court noted that the purpose of a public trial was to guarantee fairness but that this right was not absolute, and that a balancing of interests might justify closing of the courtroom. The court then stated, "The propriety of the trial court's action depends on the particular circumstances of the case." 533 F.2d 993. See Aaron v. Capps, 507 F.2d 685 (5th Cir.) cert

denied, 423 U.S. 878 (1975); Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975).

The exclusion of the public either in whole or in part has been ruled constitutionally acceptable where closed proceedings were determined to be necessary in order to preserve order and protect the defendant or witnesses. In United States ex rel. Smallwood v. LaValle, 377 F.Supp. 1148 (E.D.M.Y.), aff'd without opinion 508 F.2d 837 (2d Cir. 1974), cert. denied, 421 U.S. 920 (1975), the trial court did not deny the accused a fair and public trial where the trial court's order excluding spectators from the courtroom was based partly on its concern for the state's witness and her unborn child and partly on her subjective fear of retaliation if she publicly testified. The record, significantly, did not establish a real danger to the witness' health or to the health of the child or the reasonableness of her fears in terms of actual threats received. In Butler v. Smith, 416 F.Supp. 1151 (D.C.N.Y. 1976), the temporary exclusion of the public from the court during the testimony of two of the state's minor witnesses during a murder trial did not violate the defendant's Sixth Amendment right to a public trial. The exclusion was to protect the witnesses who were found to have a sincere fear of reprisal if they testified. In United States ex rel. Lloyd v. Vincent,

520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975), the defendant was not denied his right to a public trial by the exclusion of the public during the testimony of undercover agents in order to maintain the secrecy of the identities of the agents. The appellate court determined that it was within the trial court's power to make a finding that exclusion was required on the basis of his judicial knowledge of the role of undercover agents even if the better course would have been a hearing.

Mr. Gentry, who was convicted with Mr. Harding and Appellant, appealed his conviction in State v. Gentry, No. 16757 (Utah June 19, 1980), (Appendix A), raising this same issue that he was denied his right to a public trial. This Court rejected his claim stating:

> No one as yet successfully has contended, as the appellant seems to do here, that the Sixth Amendment's interdiction is applicable under any conceivable circumstances, and its language never was intended to protect any right to subject a magistrate to ignore a reasonable or even possible danger of personal harm or disruption of the dignity of his courtroom. The mere fact that appellant was a known escapee at a prior time, of itself should warrant exclusion of the public, if for no other reason than the spectators themselves might suffer harm or even death in an escape that a judge may have reason to believe may eventuate.

After Mr. Gentry's conviction was confirmed by this Court, he petitioned the United States Supreme Court for a writ

of certiorari. His petition was denied in Gentry v. Utah, 100 S.Ct. (1981).

In the petitioner's case, the trial judge ordered the courtroom closed in the afternoon of the final day of trial (T.224,245). After the courtroom was closed, Mr. Harding and Mr. Purcell testified. The judge stated that the courtroom had been closed because the court had received information from a social worker at the prison, via the Murray Police Department, that the defendants would try to escape during the proceedings (T.258).

Pursuant to the judge's duty to insure the orderly administration of justice and to protect the defendants, witnesses and members of the general public in attendance at the trial, and to prevent the possibility of violence, he exercised his right to exclude the public from the courtroom.

The trial judge could reasonably have believed that there was a clear danger not only of an escape attempt by appellant, but also the possibility of harm to members of the public, the defendant, and to witnesses if such an attempt should occur. It was entirely possible that if such an escape attempt was made, a spectator could have been taken hostage. It is equally likely that accomplices would be present in the courtroom to aid in the attempt.

The proceedings in petitioner's case were closed for a minimal duration since the closure did not take place until the trial was almost over and at that time it was closed only to the extent necessary to prevent an escape. The trial judge, in a careful effort to prevent any prejudice to the defendant refrained from informing the jury of any likelihood of an escape. The jury was not told that the doors had been locked and there was no evidence of a secret, coercive atmosphere.

At trial appellant made no request for a pre-closure hearing. He voiced only a general objection to the exclusion of the public from the courtroom (T.258). Nevertheless appellant cites People v. Jones, 47 N.Y.2d 409, 391 N.E.2d 1335 (N.Y.App. 1979), claiming that the courts failure to hold a hearing to determine the reliability of the information received denied him his right to a public trial. Respondent would point out that the position taken by the New York court in Jones is not constitutionally mandated, nor are there any such requirements in the Utah Constitution, Utah statutes or Utah case law. Furthermore, other courts have rejected the claim that an evidentiary hearing must be held before a courtroom may be closed.

In United States v. Hernandez, 608 F.2d 741

(9th Cir. 1979), the appellate court stated that while the "better course" is to hold an evidentiary hearing on the matter, the trial court's order to clear the courtroom for a limited portion of the trial should be upheld where there was a reasonable basis to conclude that the safety of certain witnesses might be in jeopardy, 608 F.2d 747-748. In United States ex rel. Lloyd v. Vincent, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975), the appellate court upheld the trial court's order to exclude the public solely on the basis of the prosecutor's asserted need for confidentiality of undercover agents; the appellate court determined that it was within the trial court's power to make a finding that exclusion was required based on the trial judge's judicial knowledge of the role of undercover agents.

The circumstances in this case also justified the closing of the courtroom. The trial judge, on the basis of his judicial knowledge of the dangers inherent in escape attempts, justifiably closed the trial to the public for a short period of time to prevent an escape and to protect the public, witnesses, and the appellant himself from what could have been a dangerous situation. The fact that other alternatives could have been used by the trial

judge does not make his actions improper. Respondent submits that the trial court did not abuse its inherent discretionary powers to prevent interference with orderly courtroom procedures by closing the courtroom in appellant's case.

POINT IV

APPELLANT WAS NOT PREJUDICED BY THE CLOSING OF THE PROCEEDINGS

Appellant cites State v. Jordan, 57 Ut 612, 146 P. 565 (1921), which held that, if a defendant is denied his right to a public trial, prejudice is presumed. Respondent submits that this does not mean that a violation of a defendant's right to a public trial is prejudicial per se, but that the error can be overcome when this Court is convinced beyond a reasonable doubt that the error had no prejudicial effect upon the proceedings. State v. Scandrett, 24 U.2d 202, 468 P.2d 639 (1970). In Scandrett this Court stated:

> There are two differing views as to the effect of error in violating a constitutional right. On the one hand it is sometimes stated that the violation of such a right should be deemed prejudicial per se;[footnote omitted] and on the other, that it may depend upon the circumstances. The first proposition has the frailty of most generalities. Simply that it is not universally true. There are certainly

> conceivable circumstances where the violation of a constitutional right could have no possible bearing upon any unfairness or imposition upon the defendant, or upon a correct determination of his guilt or innocence. We think the correct view, and the one which is both practical and in keeping with the desired objective of fundamental fairness and due process of law, is that there is a presumption that such error is prejudicial, but that it can be overcome when the court is convinced beyond a reasonable doubt that it had no such prejudicial effect upon the proceedings. [footnote omitted] Correlative to this it is also true that when the guilt is shown by other untainted evidence so overwhelming that there is no likelihood whatsoever of a different result in the absence of such error or irregularity, there should be no reversal. [footnote omitted] To reverse under either of such circumstances results in the distortion of the processes of justice and the unnecessary proliferation of legal proceedings.

Id. at 643.

In the instant case the courtroom was closed during the afternoon of the last day of trial. After the courtroom was closed, the only testimony received was from Mr. Hardy and Mr. Purcell. Their testimony covers approximately 13 pages of transcript (T.247-255 and T.263-267). Therefore, the proceedings were closed for a very short period of time towards the end of the trial. The trial judge was careful not to prejudice the jury by

discussing the reasons for closing the courtroom in front of them (T.245,258). Respondent submits that even if, arguendo, appellant was denied his right to a public trial his conviction should not be reversed because he was not prejudiced.

CONCLUSION

Appellant has failed to raise any issues which would justify the reversal of his conviction.

First, the trial court properly ruled that the defense of compulsion did not apply to the facts presented in this case. This Court has held that the defense of compulsion is only applicable where a person is ordered to engage in proscribed conduct with a concurrent threat of injury if he fails to obey. In this case appellant was not ordered to escape. Therefore, the defense is inapplicable.

Appellant has cited a number of cases which have not taken the approach taken by this Court. However, the defense of compulsion would be inapplicable even under the standards set forth in these cases.

Under the Lovercamp line of cases appellant must show that he was faced with a specific threat of bodily injury in the immediate future, that he made attempts to

take advantage of legal alternatives, and that he immediately reported to officials once the escape was effectuated. Appellant did not meet any of these prerequisites. Under the Luther line of cases defendant must make out a prima facie showing of compulsion before the defense will be submitted to the jury. In the instant case appellant failed to make this showing because he did not establish that at the time of his escape there was any imminent threat working on his mind that caused him to escape. Therefore, appellant has failed to show that the defense of compulsion is applicable to the instant case under either of these standards.

Second, the fact that the testimony of Al Chavez was excluded is not a basis for reversal of appellant's conviction. The trial judge has the discretion to exclude admissible evidence if the probative value of the evidence is outweighed by the risk that the admission of the evidence would consume too much time. In the instant case the probative value of admitting cumulative evidence was outweighed by the risk that to much time would have been consumed by granting a continuance. Moreover, if error occurred, it was harmless.

Third, appellant was not denied his right to a

public trial. The information received by the court that the defendants were planning an escape justified the closing of the courtroom in order to prevent interference with orderly courtroom procedures. However, assuming that appellant was denied his right to a public trial, his conviction should not be reversed because he was not prejudiced.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Brief of Respondent to Lynn R. Brown, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South Second East, Salt Lake City, Utah 84111, this 6O day of July, 1981.

Earl F. Dorius-la
ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah,
Plaintiff and Respondent,

v.

Delmont L. Gentry,
Defendant and Appellant.

No. 16757

F I L E D
June 19, 1980

Geoffrey J. Butler, Clerk

PER CURIAM:

This is an appeal from a conviction by a jury for escape from the State Prison. The defendant does not deny guilt but contends he was denied his Sixth Amendment guaranty of a public trial.

Near the end of the trial, the judge received a call from an attendant at the Prison to the effect that he had reason to believe an escape might be attempted by the defendant and his two codefendants. The courtroom was thereafter cleared of spectators, a precautionary act which is the basis for claimed error presented on this appeal. The defendant had escaped once before, fled to California and was returned after capture, at taxpayers expense.

No one as yet successfully has contended, as the appellant seems to do here, that the Sixth Amendment's interdiction is applicable under any conceivable circumstances, and its language never was intended to protect any right to subject a magistrate to ignore a reasonable or even possible danger of personal harm or disruption of the dignity of his courtroom. The mere fact that appellant was a known escapee at a prior time, of itself should warrant exclusion of the public, if for no other reason than the spectators themselves might suffer harm or even death in an escape that a judge may have reason to believe may eventuate.

Citation of authority appears to be unnecessary to affirm the trial court here, which affirmance is the order of this Court.

Wilkins, Justice, does not participate herein.

This opinion is not regarded as adding anything significant to existing law and hence is not to be published in the Utah Reporter or Pacific Reporter.