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State of Utah v. Moses H. Harris : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent,

— vs. —

MOSES H. HARRIS,

Defendant and Appellant.

} Appeals No.
8065

BRIEF OF RESPONDENT

STATEMENT OF FACTS

We agree with appellant's statement of facts but desire to add one small note. The trial of this cause followed the procedure outlined and sanctioned by this court in the case of *State v. Stewart*, 110 Utah 203, 171 P. 2d 383. Appellant was first convicted of the crime of driving a motor vehicle while under the influence of intoxicating liquor under an information containing two counts. The first count charged him with the substantive offense and the second with having been previously convicted of the same offense. After a verdict of guilty was returned under the first count, the second portion of the information was read and trial was had upon this issue. The jury returned a verdict of guilty of having been previously convicted of the same offense.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT THAT APPELLANT HAD BEEN CONVICTED OF THE PRIOR OFFENSE OF DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

POINT II.

THE COURT DID NOT ERR IN THE ADMISSION OF A CERTIFIED COPY OF THE MINUTE ENTRIES AND JUDGMENT OF AN ALLEGED PRIOR CONVICTION OF APPELLANT IN LOGAN CITY COURT.

POINT III.

THE COURT DID NOT DIRECT A VERDICT IN ITS INSTRUCTIONS ON THE ISSUE OF PRIOR CONVICTION. IF THE INSTRUCTION WAS ERRONEOUS; NEVERTHELESS APPELLANT WAS NOT PREJUDICED.

POINT IV.

IN THE EVENT THE JUDGMENT BASED UPON THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF A PRIOR CONVICTION IS REVERSED, A NEW TRIAL SHOULD BE GRANTED ONLY AS TO THAT PART OF THE CHARGE.

ARGUMENT

POINT I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT THAT APPELLANT HAD BEEN CONVICTED OF THE PRIOR OFFENSE OF DRIVING WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR.

POINT II.

THE COURT DID NOT ERR IN THE ADMISSION OF A CERTIFIED COPY OF THE MINUTE ENTRIES AND JUDGMENT OF AN ALLEGED PRIOR CONVICTION OF APPELLANT IN LOGAN CITY COURT.

Since Points I and II are intertwined and appellant has considered them together in his brief, we shall do the same. On the issue of identity appellant cites *State v. Bruno*, 69 Utah 444, 256 P. 109, for the proposition that identity is an element to be proved beyond a reasonable doubt. He then complains of the absence of any evidence showing the two defendants to be the same and asserts that this question should not have gone to the jury. We have no quarrel with the reasonable doubt rule for it is elementary. The matter of identity however is something lying entirely within the province of the jury to decide and thus it should be submitted to them. The Bruno case cites *State v. Aime*, 62 Utah 476, 220 P. 704, for the principle that the issue of identity should be submitted to the jury. In both of those cases as in the one at bar there was no evidence other than the record itself on the question of identity and the defendant in testifying did not deny that he was the person formerly convicted. The Aime conviction was affirmed on the grounds that the issue was put to the jury. The Bruno conviction was set aside because the court peremptorily instructed the jury that the records of the City Court were to be taken as prima facie evidence of the fact that the defendant was formerly convicted, thus charging them that as a matter of law that fact was established.

Therefore, the only question here to be resolved is whether the question of identity was properly put to the jury. The charge is set out in appellant's brief on pp. 4-5 so we shall not set it out here. We call attention however to the fact that the court specifically charges the jury with the duty, on the evidence before them, of finding that appellant was charged, entered a plea of guilty and sentence pronounced in order to find that he was previously convicted. Counsel for appellant stated further that they should find beyond a reasonable doubt that he was convicted in the City Court of the crime of drunken driving. The court adopted this.

It is true that the City Court prosecution was against a "Mose Harris". However, in the trial of the substantive offense it is to be noted that the appellant was repeatedly referred to as "Mose" by his own witnesses (Tr. 57, 58, 60, 63, 70). It is apparent also that appellant had lived in the valley for a number of years and was well known, and further, that the conviction was had in the precinct of appellant's residence. He made no proper objection to the reception of the certified copy, offered no evidence, made no request for instruction or an exception to a failure to instruct and made no argument on this question, a matter clearly within his own knowledge. This case in this respect seems to fall within the rule laid down by *State v. Aime*, supra, where it was held:

But the verdict in this case does not rest upon the bare proof of identity of name. There was the additional circumstance that the previous conviction was had in the precinct of defendant's resi-

dence, and the more significant fact that, although the defendant testified as a witness in his own behalf, he did not deny that he was the person described in the record of conviction previously introduced in evidence against him. While under Comp. Laws Utah 1917, §9279, the neglect or refusal of a defendant to be a witness cannot prejudice him or be used against him, when he voluntarily testified he is subject to the same rules as other witnesses, and his failure to deny a material fact within his knowledge previously testified to against him warrants the inference that it was true. *State v. Mattivi*, 39 Utah, 334, 117 Pac. 31.

We assert therefore that the question of identity was put to the jury, that they could find from the evidence that the appellant was formerly convicted and that their verdict of guilty properly assumes that they believed appellant to be the one previously convicted.

Appellant in support of his attack upon the lower court's admission of a certified copy of minute entries and judgment showing an alleged prior conviction in Logan City Court, relies upon the case of *State v. Florence*, 79 Utah 200, 8 P. 2d 621. The Florence case perhaps recited the rule insofar as mere docket entries were concerned in view of the applicable statute as it then existed. That statute was Comp. Laws Utah 1917, §8844, and provided as follows:

In pleading a judgment or other determination of, or proceeding before, a court or officer of special jurisdiction, it shall not be necessary to state the facts constituting jurisdiction; but the judgment or determination may be stated as given or made, or the proceedings had. The facts consti-

tuting jurisdiction, however, must be established on the trial.

This section carried over into R. S. U. 1933 verbatim, and appeared as 105-21-17. However, in 1935 the legislature completely re-wrote the Code of Criminal Procedure, Laws of Utah 1935, Ch. 118, and this section, there denominated as 105-21-29, emerged as it now stands in 77-21-29, U.C.A. 1953. It has a new and different meaning now, however. It provides as follows:

(1) In referring in an information or indictment to a judgment or other determination of, or a proceeding before, any court or official, civil or military, it is unnecessary to allege the facts conferring jurisdiction on such court or official, but it is sufficient to allege generally that such judgment or determination was given or made or such proceeding had, in such manner as identifies the judgment, determination or proceeding.

(2) If the judgment was given by an officer exercising special jurisdiction or by a court other than a court of record the facts constituting jurisdiction must be established on the trial.

Thus the legislature has since seen fit to impose the rule laid down in the Florence case only on judgments given by officers exercising special jurisdiction or courts other than courts of record. There is now no such requirement where courts of record are concerned. That city courts are courts of record is set out in 78-1-1 and 78-1-2, U.C.A. 1953, which provide as follows:

78-1-1. The following are the courts of justice of this state:

(1) The senate sitting as court of impeachment.

- (2) The Supreme Court.
- (3) The district courts.
- (4) The city courts.
- (5) The juvenile courts.
- (6) Justices' courts.

78-1-2. The courts enumerated in the first ~~above~~ subdivisions of the preceding section are courts of record.

Clearly then, the case of *State v. Florence* is not in point and the certified copy was properly received in evidence.

POINT III.

THE COURT DID NOT DIRECT A VERDICT IN ITS INSTRUCTIONS ON THE ISSUE OF PRIOR CONVICTION. IF THE INSTRUCTION WAS ERRONEOUS; NEVERTHELESS APPELLANT WAS NOT PREJUDICED.

Appellant relies on the holding in *State v. Bruno*, supra, as authority for striking down the instruction here given, asserting that it directs a verdict. The instruction in that case was as follows:

In this case the records of the city court of Salt Lake City, Utah, before Noel S. Pratt, city judge, and ex officio justice of the peace, have been received in evidence; that said records show that on or about the 3rd day of September, 1924, the defendant was found guilty of having intoxicating liquor in her possession, so that you are to take that as prima facie evidence of the fact in the case.

There is a material difference between that instruction and the one given here. As recited before, the Bruno

instruction peremptorily instructed the jury that the records of the City Court were to be taken by them as prima facie evidence of the fact of conviction. In the instant case the court's pronouncements were permissive in nature, still leaving the determination of the fact to the jury. While the charge might properly have been framed in a different manner, it can be struck down only on a showing that a substantial right of the defendant has been affected. There is in fact a presumption that error shall not be deemed to have resulted in prejudice. This is contained in 77-32-1, U.C.A. 1953, as follows:

After hearing an appeal the court must give judgment without regard to errors or defects which do not affect the substantial rights of the parties. If error has been committed, it shall not be presumed to have resulted in prejudice. The court must be satisfied that it has that effect before it is warranted in reversing the judgment.

The case of *State v. Cluff*, 48 Utah 102, 158 P. 701, contains an extensive discussion of error resulting in prejudice. There the trial court's ruling indulging improper cross examination was complained of. This court through Straup C. J., held that some committed errors, prima facie, are not calculated to do harm, and hence no presumption of harmful effect is to be indulged, but that the party affected may, by the record, show that the ruling resulted in prejudice of some substantial right. On the other hand, error may be committed which, prima facie, is calculated to prejudice some substantial right. Prejudice will then be presumed until, by the record, it is shown that it did not or could not have prejudiced a

substantial right. The court there affirmed the conviction on the ground that though prejudice should be presumed from the error there committed; nevertheless, the record disclosed no violation of a substantial right in the face of the undisputed evidence of guilt. The court said:

Upon this evidence we do not say that the defendant is guilty, or that he ought to have been convicted. It is not within our province to decide that or to determine his guilt or innocence. But because of the undisputed evidence, and the undenied admissions of the defendant, we are satisfied that the same result would have been reached by the jury had not the improper cross-examination and argument been permitted, and hence that the verdict was not influenced thereby. It may be asked, How do we know that? We know it by attributing to the jury the common sense and experience possessed by the average juror who, mindful of his duty as a juror and considering the evidence dispassionately, could not well have rendered a verdict of not guilty without disregarding the undisputed evidence and undenied admissions of the defendant as to his guilt.

We submit that in the instant case, confronted only by the record of conviction, the jury could not well have rendered a verdict of not guilty without disregarding the undisputed evidence before them. Thus the same result would have been reached in the absence of the statement by the court, and hence the verdict was not influenced thereby.

It is law too elemental for citation of authority that instructions are to be considered as a whole and may

not be picked apart and portions of them assigned as error. If the charge overall is fair, it must stand. The instruction in the instant case as a whole was fair and left it to the jury to determine guilt or innocence.

POINT IV.

IN THE EVENT THE JUDGMENT BASED UPON THE JURY'S VERDICT FINDING DEFENDANT GUILTY OF A PRIOR CONVICTION IS REVERSED, A NEW TRIAL SHOULD BE GRANTED ONLY AS TO THAT PART OF THE CHARGE.

In the event the judgment based upon the prior conviction is reversed, the whole matter should not be sent back for a new trial. Appellant would be entitled to a new trial only on the issue of having been previously convicted. The substantive conviction should stand. This must be so from the very nature of the proceeding. In such a case as this a defendant is tried first on the substantive offense. No issue of prior conviction is injected into this trial. It is not an element of the substantive offense. Until a verdict is rendered on the principal issue, there is no occasion to mention the prior conviction because the previous offense would not be competent to prove the defendant committed the offense for which he is then on trial. Thus it differs from the case of a persistent violator charge where the previous conviction is an element. *State v. Stewart*, supra. If a verdict of guilty is returned, the second count in the information is then read and the trial proceeds solely on the issue of a prior conviction in front of the same jury. Therefore, any error committed in the trial of this second issue

would not relate at all to the conviction on the substantive offense.

CONCLUSION

We submit that the evidence was sufficient to support the verdict of prior conviction; that the court did not err in admitting the certified copy of the City Court records and that the court did not direct a verdict in its instructions on the issue of prior conviction, and further that if the instruction was erroneous, nevertheless appellant was not prejudiced.

Respectfully submitted,

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