

1954

State of Utah v. Paul Buddy S. Clair : Brief of Respondent

Utah Supreme Court

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E. R. Callister; John W. Horsley;

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In the
Supreme Court of the State of Utah

AUG 13 1954

Clerk, Supreme Court

STATE OF UTAH,
Plaintiff and Respondent,

vs.

Case No.
8166

PAUL BUDDY ST. CLAIR,
Defendant and Appellant.

RESPONDENT'S BRIEF

E. R. CALLISTER,
Attorney General,

JOHN W. HORSLEY,
Assistant Attorney General.

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Respondent,

vs.

PAUL BUDDY ST. CLAIR,
Defendant and Appellant.

} Case No.
8166

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent does not controvert appellant's statement of facts, but it is felt that an additional statement, in narrative form, will be helpful.

That defendant killed Vesta Wittke is not seriously disputed. The shooting was described by an eye-witness, deceased's 15-year old daughter, Patricia (R. 22), and the attending physician testified that the gunshot wounds caused the death (R. 54). None of defendant's evidence

is contrary: defendant admitted his entry into deceased's bedroom (R. 111) with a gun (R. 112) and did not deny that he shot deceased (R. 112). The circumstances surrounding the homicide however are in dispute in many particulars. The record supports the following general outline.

Defendant became a boarder at the home of Vesta Wittke in Grantsville, Utah about midsummer, 1952 (R. 38). The Wittke family (consisting of deceased; a daughter, Patricia, age 15; and three sons: Dayton, 20; Jack, 13; and Don, 9) moved to Pine Canyon, Tooele County, about Thanksgiving time, 1952 (R. 39). Defendant moved along with the family, but lived at the Wittke home only about a week or two thereafter (R. 21, 39, 103). Defendant attempted, throughout the trial, to show that he had been sexually intimate with deceased in Hawaii in 1943 (R. 111), while boarding at her home (R. 33), and until three or four days before the crime (R. 107).

During the early morning hours of July 3, 1953, about 1:30 a. m., deceased and defendant quarreled in the kitchen of deceased's home. Defendant was drunk (R. 40, 72). A scuffle ensued over defendant's car keys (R. 40) and deceased hit defendant on the head with a poker, drawing blood (R. 40, 108). The lacerations required eight stitches (R. 139). Defendant left the house afoot, and was picked up by the sheriff and given a ride back to Tooele (R. 108-109). During the ride with the sheriff, defendant threatened to "... get even with that smart little son-of-a-bitch Dayton; and he said there would be a payday for Vesta" (R. 72).

On the night of July 5th, Patricia slept in the same bed with her mother (R. 21). The front door had been locked with a key, the front screen door was hooked, and the back screen door was hooked (R. 26-27). Patricia was awakened about 1:30 a. m. by Vesta's scream, and saw defendant shoot Vesta (R. 22). The murder weapon, a .38 revolver, had been borrowed by defendant from an acquaintance the day before, on the pretext of a target shooting match (R. 10-11). The jury could find that defendant entered the Wittke home by cutting through the screen of the back screen door and lifting the hook, since someone cut the screen that night (R. 68; Exhibits 6 and 7). After Vesta was shot, Dayton, the 20-year old son, entered the room and took the gun from defendant, who did not resist (R. 45). Dayton sent Patricia to get a gun and then to the neighbor's telephone (R. 24). The sheriff, and an ambulance, were called (R. 60, 63). Defendant sat on a chair, then said to Dayton, "Go ahead and shoot me." Dayton pointed the revolver at defendant and pulled the trigger, but the gun did not fire (R. 41). Defendant then walked past Dayton, out to his car, and drove away; Dayton shot at the departing car with a .22 rifle (R. 42).

Vesta's dying declaration to her neighbor, Bruce Sagers, was: "Bruce, before I pass out I would like you to know what Paul said to me. He come in flashed on the light and said 'Vesta, this is payday' and began firing at me" (R. 63). A somewhat similar declaration was made to Sheriff Gillette (R. 80).

Vesta was removed in an ambulance and arrived at the Tooele Clinic about twenty minutes after the shooting at

1:50 a. m. in "very critical" condition (R. 53). She had one bullet wound in the chest and one in about the middle of the abdomen (R. 53-55). Another wound was later discovered in her back (R. 75). She died at 11:05 p. m. that day (R. 54).

Defendant's version, briefly, is that he drove to Vesta's house about 10:00 p. m., pursuant to her telephoned request (R. 110). Vesta had company, so he drove on, returning some time after 1 a. m. (R. 111). The door was not locked, defendant says, and he entered the house, went in the bedroom, and turned on the light (R. 111). His claim is that he sat on the bed (R. 118) and had a conversation, with the light on, while Patricia slept (R. 112). The talk about "payday" was a reference to a debt of \$150.00 Vesta owed defendant, plus \$15.00 to sew up his head (R. 112). Vesta told defendant that there was no indebtedness and that defendant had been fully paid, from which defendant ". . . gathered I had been buying my favors." Defendant says he does not remember anything else. "I just, I guess, I went crazy mad" (R. 112). Defendant's explanation for his carrying a loaded pistol was that he very often carried a gun on his person (R. 113), and that he felt it would be protection against another beating (R. 125).

The State's rebuttal was evidence that Vesta could not have telephoned defendant on July 5th at 3 p. m. as he claimed: she was at home all afternoon where there was no telephone (R. 159, 163). The Manager of the Glenwood Club, where defendant resided, testified that defendant received no telephone call that day (R. 169-170).

STATEMENT OF POINTS

POINT I.

THERE WAS NO ERROR WITH RESPECT TO THE SHERIFF'S TESTIMONY ABOUT THREATS MADE BY DEFENDANT; IN ANY CASE THE INCIDENT WAS WITHOUT PREJUDICIAL EFFECT.

POINT II.

THE ADMISSION OF THE WITNESS SAGER'S TESTIMONY AS TO DECEASED'S DYING DECLARATION WAS NOT ERROR.

POINT III.

THE ADMISSION OF THE SHERIFF'S TESTIMONY AS TO DECEASED'S DYING DECLARATION WAS NOT ERROR.

POINT IV.

THE VERDICT IS SUPPORTED BY THE EVIDENCE.

ARGUMENT

POINT I.

THERE WAS NO ERROR WITH RESPECT TO THE SHERIFF'S TESTIMONY ABOUT THREATS MADE BY DEFENDANT; IN ANY CASE THE INCIDENT WAS WITHOUT PREJUDICIAL EFFECT.

Defendant assigns as error an occurrence during the direct examination of Sheriff Gillette. It is contended that improper evidence of threats made by defendant were thereby brought before the jury. The passage complained of is as follows (commencing R. 72, 1. 25) :

“Q. Did you see Vesta Wittke between the 3rd and 6th?

“A. I did.

“Q. Where did you see her?

“A. I seen her once down town, and was called at least three times at the office by her, and she visited my home the night of the 5th, the night of July 5th.

“Q. And why did she call you?

“A. She was worried, worried about her welfare and her children's welfare.

“Q. Why was she worried?

“MR. HANSEN: I object to it, it is immaterial what she told the sheriff. I move to strike the conversation.

“THE COURT: The motion is denied.

“A. She told me that she had been called at work several times from Paul St. Clair, at least once from Salt Lake by Paul St. Clair, and other times in which she said she had been threatened and she was agitated and worried,—and she was worried quite a great deal.

“Q. Directing your attention—

“MR. HANSEN: I would like to make another motion that this answer be stricken, it is made by a declaration of the witness and not subject to cross

examination, and if this was a dying declaration it was long before the shooting.

“MR. ANDERSON: We will join in the motion; it may go out.

“MR. HANSEN: You also join in the other one?

“MR. ANDERSON: We join in the other one, the last two answers may go out.”

It is seen that the prosecutor promptly and unequivocally agreed that the testimony be stricken. There was no possible fairer way in which to have taken care of the matter. There can be no question therefore but that the jury knew that the testimony was not to be considered. In this respect they were charged (Instruction No. 13):

“You should not consider, or be influenced by, any evidence offered by not admitted, nor any evidence stricken out by the court, but only such evidence as has been admitted in the case. You should not consider, or be influenced by, any statement of counsel as to what the evidence is, unless they state it correctly, or by any statement of counsel of facts not shown in evidence, if any such has been made. You should not be influenced by any statements the court may have made in ruling upon questions of law or otherwise in your hearing, if any has been made, that seem to indicate any opinion upon any question of fact.”

In *State v. Hammond*, 46 U. 249, 148 P. 420, a bastardy case, improper evidence was received and then ordered stricken, the jury being instructed to disregard it. This procedure was held to protect defendant's rights. The same

principle applies here, and in this case there was no error with respect to this incident.

There is further reason why the court should not permit the episode outlined above to affect the appeal. The settled rule is that an error or defect, in order to be considered on appeal, must have had prejudicial effect. The rule has been applied by this court in *State v. Woods*, 62 U. 397, 220 P. 215, a murder case. In *State v. Hett, et al.*, 64 U. 505, 231 P. 838, erroneously admitted evidence was held to be prejudicial as to one of two co-defendants on trial for murder, and non-prejudicial as to the other defendant, whose conviction was affirmed. This rule has also been written by the Legislature into our Code of Criminal Procedure. Sec. 77-42-1, U. C. A. 1953, reads 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.”

When the passage is read in context it is plain that no damage was done defendant by the incident because there was already other evidence of threats made by defendant against the woman he murdered. Such evidence was squarely before the jury, without objection, prior to the incident complained about here. Three days before the murder, and after the quarrel in deceased's kitchen, defendant made threats against deceased and her son in the presence of the sheriff. The sheriff's testimony is (R. 72) :

“A. He [defendant] told me he would get even with that smart little son-of-a-bitch Dayton; and he said there would be a pay day for Vesta. He related that she owed him some money. He had done a favor for her and for Dayton and there would be a pay day.”

Thus, before the incident here complained of, the jury already had before it other evidence painting a picture of a vengeful man sufficiently reckless to make his threats in the presence of the very officer of the law whose duty defendant knew it would be to enforce the law against him if he made good his threats. This incident was without prejudicial effect, or any effect at all, upon the result of the trial.

It is further to be noted that defendant raised no objection until part of the passage here complained about was before the jury. The sheriff had already said, after having properly testified to threats, that the deceased had called him and “was worried” immediately before the murder. It must be said that this occurrence was brought about by defendant as much as anyone else.

Respondent urges that this incident, looked at properly in context as against the background of the whole lengthy trial, is so trivial that the court should not deem it of any consequence.

POINT II.

THE ADMISSION OF THE WITNESS SAGER'S
TESTIMONY AS TO DECEASED'S DYING
DECLARATION WAS NOT ERROR.

Defendant in his Point II assigns as error the admission of a statement made by deceased after being shot. The testimony is that of her neighbor, Bruce Sagers, respecting a declaration made by deceased. The testimony was admitted on the theory that it was a dying declaration. Defendant urges here that foundation was lacking.

Murder cases involving dying declarations are numberless. Stated broadly, the rule is that the declaration can come in only if the declarant has abandoned hope of recovery and believes death to be near at hand. For a general statement, see 40 C. J. S., Homicide, Sec. 290. As a predicate for the admission of the declaration, the trial court must find the requisite consciousness of impending death.

Dean Wigmore's discussion of this problem is helpful. In *V Wigmore on Evidence*, 3rd Ed., Sec. 1442, it is said:

"In ascertaining this consciousness of approaching death, recourse should naturally be had to all the attending circumstances.

"It has been contended that only the statements of the declarant himself could be considered for this purpose; or, less broadly, that the nature of the injury alone could not be sufficient, i. e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have realized his situation, our object is sufficiently attained.

"Such is the settled judicial attitude: [citing cases.]

* * * * *

“No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances.” (Italics added.)

The question here is whether, all the circumstances considered, the trial court could reasonably have found a sufficient awareness on deceased's part of her then-impending death. To make this determination, the trial court had the following before it: deceased had just been mortally shot in the middle of the chest and in the abdomen. Both bullets passed through her body. The doctor who examined her characterized her condition at 1:50 a. m. thus (R. 53): “She was in shock; she had no palpable pulse, no blood pressure in the arm, her skin was cool and clammy.” And further: “She was certainly very critical, anyone that is in that severe shock is in danger of losing their life at any time.”

As to deceased's awareness of her condition, the trial court had heard evidence that deceased had said to her daughter, after the shooting (R. 29): “She told me not to go to pieces, that I had to take care of Don [the 9-year old boy]; and she told me to kiss her, and she said goodbye.”

The declaration complained of is (R. 63):

“She said ‘Bruce, before I pass out I would like you to know what Paul said to me. He come in flashed on the light and said “Vesta, this is payday” and began firing at me.’ ”

Defendant relies principally upon a narrow, rigid rule based upon older cases. He notes that deceased asked for medical help, and argues from this that she entertained a hope of recovery. This, it is said, negates admissibility. Defendant finds comfort for this view in an old Kentucky case, *Matherly v. Commonwealth* (1892), 14 Ky. L. Rep. 182, 19 S. W. 977. That case cannot be said to be good law at present. It is no longer the rule applied in Kentucky courts. In *Turner v. Commonwealth*, 268 Ky. 314, 104 S. W. 2d 1087, the Kentucky court said:

“It is claimed that the statements of the deceased are not competent as dying declarations, since it does not appear they were made under a sense of impending death. Several witnesses, including two or three introduced by appellant, testified that the deceased stated that he had been killed and requested that he be buried by the side of his mother. Such statements, coupled with the serious nature of the wound, indicated that the deceased was fully aware of his condition and was without hope of recovery. It is true that he expressed a desire to be taken to the hospital, but this does not negative the inference that he was laboring under a sense of impending death. As was said by this court in *Walls v. Com.*, 257 Ky. 478, 78 S. W. (2d) 322, 323, when speaking of statements admitted as dying declarations: ‘These statements were not rendered inadmissible by showing Stevens asked for a doctor and to be taken to a hospital; a man may make such requests in the hope of obtaining some relief from suffering.’ ”

See also *Bates v. Commonwealth*, 307 Ky. 357, 211 S. W. 2d 130. Another modern case in which a dying declaration

was admitted despite the request of deceased that a doctor be called is *Patterson v. State*, 199 Ga. 773, 35 S. E. 2d 504.

State v. McNair, 53 U. 99, 178 P. 48, is the only Utah case dealing with dying declarations. In that case, the victim had been shot and removed to the hospital some time after 3:00 p. m. He was told that he was on his deathbed. He “. . . raised up in bed and said he would outlive his enemies.” Later, however, the victim said to two persons that he knew he was going to die. He died at 6:00 p. m., after having made a declaration about the circumstances of the homicide. The declaration incorporated a statement about his awareness of impending death. The declaration was admitted as evidence.

Taken altogether, the case for admission of the declaration here is at least as strong as that presented in the *McNair* case. The finding of the trial judge was well within reasonable discretion and should not be set aside here.

POINT III.

THE ADMISSION OF THE SHERIFF'S TESTIMONY AS TO DECEASED'S DYING DECLARATION WAS NOT ERROR.

The same authorities advanced under Point II are apposite here. The testimony of Sheriff Gillette with respect to the dying declaration was not even objected to by defendant. Respondent is puzzled to know just what defendant would have the trial court do about the situation, absent objection, or motion to strike, or request for an in-

struction to disregard the testimony. At all events the evidence was perfectly admissible as outlined above.

POINT IV.

THE VERDICT IS SUPPORTED BY THE EVIDENCE.

Defendant's final point is that the evidence does not support the verdict. Defendant's argument is that deceased's carrying of a loaded gun at the time of his entry into the house is no evidence that he intended to kill deceased, but should rather have been interpreted merely as an attempt at self-protection against Dayton, who hated him.

The jury found otherwise. Under the evidence this is the case of a man who, having violently quarreled with the woman whom he later killed, borrowed a small gun, easily concealed on his person; who drove, after midnight, to her house and broke in by the forcible cutting of a screen door; who entered the bedroom and flashed on the light; and who then, regardless of the presence of deceased's daughter, fired the fatal gunshots, as he had threatened.

From all this, the jury was not only warranted in finding, but was in all conscience compelled to find, the requisite malice aforethought and pre-meditation.

The verdict rendered was the only verdict possible, and this is so with or without the inconsequential evidentiary matters to which defendant has addressed his Points I, II, and III. Respondent believes that when this court scrutinizes the record as a whole there will emerge a settled con-

viction as to defendant's guilt. In *State v. Woods*, 62 U. 397, 220 P. 215, cited above, evidence that was plainly erroneous came before the jury. This court concluded, however, that the evidence of the defendant's guilt was so overwhelming that the result of the trial was unaffected, and the conviction was affirmed. The *Woods* case would clearly warrant affirmance here, particularly in view of the minor nature of the incidents complained of, even should the court conclude that there was error. This is an obvious case of first degree murder. It is submitted further that this record is singularly free of any error.

CONCLUSION

Respondent earnestly urges that defendant had a completely fair trial, and was correctly adjudged guilty of first degree murder. The jury would have been wrong to have reached a different conclusion. The case should be remanded to the District Court with instructions to proceed in accordance with law.

Respectfully submitted,

E. R. CALLISTER,
Attorney General,

JOHN W. HORSLEY,
Assistant Attorney General.

