1981

The State of Utah v. Savaoor E. Pacheco : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,
-v-
SAVADOR E. PACHECO,
Defendant-Appellant.

Case No. 17527

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty of Theft, a Third Degree Felony, in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson, presiding.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, SAVADOR E. PACHECO, appeals from a conviction of Theft in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant, SAVADOR E. PACHECO, was found guilty of Theft, a Third Degree Felony, by a jury. The trial was conducted December 17, 1980 with the Honorable Dean E. Conder, presiding. Appellant was sentenced on December 22, 1980 to serve an indeterminate term of 0-5 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction.

STATEMENT OF THE FACTS

The State filed charges against appellant alleging Theft occurring on July 28, 1980. At trial, the owner testified that he received two checks earlier in the business day and put them under a handle on the top of a locked cash box. He further testified that the cash box was located in an inner office on a table. The owner, when asked if anyone besides a customer was in the store on that date, testified that he saw a short, dark man with long hair in the store. The owner testified that he had a conversation with this man in which the man asked for a job. The owner told the man no and he went out the front door. At approximately 5:30 or 6:00 p.m. that same afternoon, the owner discovered the checks were missing when he was preparing his daily deposit. He then notified police.

The appellant, testifying in his own behalf through a translator, testified that he was in the Allstates Wholesale Company on July 28, 1980. He testified that he had gone to another store in the neighborhood to look for work before going to Allstates. He testified that he obtained an application from the first business and was carrying it when he went to Allstates. Appellant further testified that when he arrived he didn't see anyone in the store. He leaned against a counter in front of the store, knocked on it to get someone's attention, and didn't get any answer. Appellant testified that he turned around quickly, knocking some papers off the counter in doing so. He picked them up and noticed a paper which looked like scratch paper which people had been doing sums on. As he was straightening up, the owner came in and appellant tried to ask him in English for work. The owner didn't seem to understand

the appellant very well, but he did seem to understand that appellant was looking for work. After being told no, appellant left the store with the papers in his hand.

After leaving the store appellant testified that he was going to a factory that manufactured toys. As he walked away from Allstate he put all the papers, including the job application, in his pocket. Appellant testified that he took the papers out later and noticed that two of the pieces of paper had a peso sign on them. It took appellant several minutes to realize that what he had were, in fact, checks. Appellant testified that he was always paid in cash in Mexico, where he lived until approximately two years ago, and that no one in his immediate family had checking accounts.

Appellant testified that after he realized that the pieces of paper were checks he thought he would either take them back to the company or throw them away because he thought they had no value to him. Appellant further testified that he hadn't intended to take the checks from the Allstate company.

Appellant also presented evidence by expert testimony from a bank officer in Salt Lake County, Ms. Mary Lou Vrabec, who testified that the checks admitted as states exhibits but without endorsements would be of no value to any bank under current banking practice.

The Judge denied appellant's motion to charge the jury only on a Class B misdemeanor based on the lack of value of the check.

Appellant was convicted by the jury of the third degree felony as charged and after a pre-sentence investigation which

revealed no prior arrests or convictions, he was sentenced to prison for the term provided by law.

POINT I

AFTER APPELLANT PRESENTED EVIDENCE AS TO THE VALUE OF THE CHECKS AND THE STATE DID NOT REBUT THIS TESTIMONY, COURT COMMITTED REVERSIBLE ERROR IN FAILING TO GRANT DEFENDANT'S MOTION FOR REDUCTION OF THE CHARGE.

Appellant was charged with theft, a third degree felony, of property over two hundred fifty dollars but less than one thousand dollars. Under Utah Code Annotated §76-6-101(4)(a,b,c) (1953 as amended) the value of stolen property is to be determined as follows:

> "Value" means: the market value of the property if totally destroyed, at the time and place of the offense, or where cost of replacement exceeds the market value; or (b) where the market value cannot be ascertained, the cost of repairing or replacing the property within a reasonable time following the offense, and (c) if the property damaged has a value that cannot be ascertained by the criteria set forth in subsections (a) and (b) above, the property shall be deemed to have a value not to exceed $50.00.

In State v. Logan, (563 P.2d 811) this court stated that the only definition of value in the criminal code of the State of Utah is found in §76-6-101 (supra). The court concluded that this applies only to property which is totally destroyed and doesn't apply to property which is merely stolen but later recovered. The court further stated:

> We find no other statute on this subject and therefore, conclude that the statute is to be narrowly construed within its stated meaning and that there is no existing statute as to the value of stolen property which is not ultimately destroyed. That being the case, we must look to the common law and to the existing case law to determine the proper test of value applicable herein. 563 P.2d at 813.

The court said that, in general, the measure of the value is its fair market value at the time and place where the alleged crime was committed. (52 A C.J.S. Larceny §60(2) 489). The court then cited State v. Clark, 537 P.2d 820, for the standard for determining whether the crime charged is to be petit or grand larceny. In Clark the court stated:

> "There is no doubt that the proper standard by which a jury should determine "value" in a case such as this is market value. Market value is defined in this state as the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction. 537 P.2d 15 824.

Since the stolen property in the present case is checks the willing buyer is normally the drawee bank. (People v. Marques, 520 P.2d 113 (1974)). A check is defined as a negotiable instrument in Utah Code Annotated 70 A-3-104 (1953 as amended). However, Utah Code Annotated 70 A-3-201 (3) 1953 as amended, states in part that:

> Negotiation of an instrument takes place only when the endorsement is made and until that time there is no presumption that the transferee is the owner.

Because the willing buyer in a check case is normally the drawee bank, someone knowledgeable in banking procedure is qualified to present testimony as to the market value of the checks when they were stolen. At trial, appellant introduced testimony from Ms. Mary Lou Vrabec as to the value of the checks. Ms. Vrabec had been employed in the banking industry for approximately seven and one half years at the time of trial. Her testimony as to value follows in part:

Q: Those two checks appear to be issued on the 28th day of July, 1980, and presuming that those two checks were in the hands of Allstates Wholesale, the first party on that check in the condition which appears on the second of the xeroxed sheet?

A: This one here?

Q: That's correct.

A: Okay.

Q: Can you tell me at that precise moment what the value of those two pieces of paper would be to Allstates-checks in that same form?

A: There would be no value until it's properly endorsed and presented.

Q: What do you mean by endorsed then?

A: Okay. It would have to be endorsed by Allstates Whole

Q: And then what would the value be after it was endorse

A: As long as there is no stop payment on the check and is collected funds which the maker's bank are willing to release the value would be of the checks.

Q: All right. So let me say this, presuming then that know that the amounts on those checks would be paid by the banks, the First Security and the Commerical Security Banks; would the value still be nothing until it was endorsed, the value to Allstates would still be nothing until it was endorsed?

A: Yes.

Q: Okay; and when you talk about stop payments and delive to banks et cetera, that's banking procedure, is that correct?

A: Yes. It is.

Q: And would you say that basically when banks have check accounts, your bank for instance buys paper from another bank basically; are you giving out money in exchange for paper aren't you?

A: Yes.

Q: And those banks do those kind of transactions all day long. In other words--

A: True.

Q: -- in other words look at the value of the paper and pay money on it in exchange for that paper, right?

A: Yes.

Q: And again, in the condition reflected by those xeroxed copies, what would be the value for instance to your bank in that same condition?

A: No value whatsoever.

Earlier in the trial, testimony from the manager of Allstates revealed that when the checks were stolen, they had not been endorsed. Thus, Ms. Vrabec's testimony as to the value of the unendorsed checks fulfills the requirement of Utah Code Annotated §76-6-101 (4)(a) which defines value as the "value of the property at the time and place of the offense." Appellant's witness testified that the value of the checks when they were stolen was nothing. The State presented no evidence as to any other value and thus appellants witness' testimony constituted unrebutted evidence. When evidence is unrebutted, the court in Thomas v. Thomas (565 P.2d 722) stated:

> "...the legal fundamental is that the court is bound by undisputed evidence so long as it is not inherently improbable. 565 P.2d 725.

Obviously here the evidence was not inherently improbable and the trial court erred in denying the motion to reduce the charges against appellant.

POINT II

A: THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN INSTRUCTIONS AND FAILURE TO DO SO CONSTITUTES PREJUDICIAL ERROR.

It is well established in Utah that an accused in a crim action has the right to submit to the jury his theory of the case, and that such theory when properly requested should be given to the jury in the form of written instructions. State v. Stenbeck, 2 P. 1050 (1931). This right of the defendant exists as long as there any substantial evidence to justify giving such an instruction. State v. Gillian, 463 P.2d 811 (1970); State v. Johnson, 185 P.2d 738 (1947).

In the present case, appellant contends that the evidence he presented at trial easily met the substantial evidence test and therefore his proposed instruction pertaining to his theory of the case should have been given. Appellant presented unrebutted testi at trial as to the market value of the checks at the time and place the crime was committed and contends that his submitted instructio should therefore have been given as proposed:

> When the value of property alleged to have been taken by theft must be determined, the market value at the time and in the locality of the theft shall be the test. The value is the highest price, estimated in terms of money, for which the property would have sold in the open market at the time and in the locality, if the owner was desirous of selling, but under no urgent necessity of doing so, and if the buyer was desirous of buying but under no urgent necessity of doing so, and if the seller had a reasonable time within which to find a purchaser, and the buyer had knowledge of the character of the property and of the uses to which it might be put.

Appellant contends that to refuse to give this instruction after he put on substantial evidence justifying it was reversible error as reiterated by the court in Gillian (supra), quoting State v. Newton, (144 P.2d 290, 1943):

> . . . each party is entitled to have his theory of the case which is supported by competent evidence submitted to the jury by appropriate instructions, and the failure to present for the jury's consideration a party's theory by appropriate instructions constitutes reversible error. 144 P.2d at 292.

Appellant believes that the facts in his case fit squarely within the confines of the test above and thus the failure of the trial court to submit the proposed instruction clearly constitutes reversible error.

POINT II

B: THE TRIAL COURT ERRED IN SUBMITTING INSTRUCTIONS 18 AND 22 BECAUSE THEY WERE INCORRECT STATEMENTS OF THE LAW IN UTAH.

Appellant contends that the court erred when it gave instruction Number eighteen to the jury because it plainly misstated the law in Utah. The instruction given by the court is as follows:

> You have been instructed regarding the essential elements of the crime of theft which the State must prove beyond a reasonable doubt. The State need only prove those essential elements.
>
> In other words, in the crime of Theft, it is not necessary for the State to prove and you are not to consider in your deliberations, whether the checks had any value to the person who took them from the owner.

The second paragraph of this instruction is a misinterpretation of the law. The controlling statute in this case is Utah Code Annotated §76-6-101 (4-a,b,c), 1953 as amended, which states:

> "Value" means: a) the market value of the property if totally destroyed, at the time and place of the offense, or where cost of replacement exceeds the market value; or b) where the market value cannot be ascertained, the cost of repairing or replacing the property within a reasonable time following the offense, c) if the property damaged has a value that cannot be ascertained by the criteria set forth in subsections a) and b) above, the property shall be deemed to have a value not to exceed $50.00.

If the property was not destroyed but later recovered, the control case is State v. Logan, supra, which held that the appropriate test to be used is the market value of the property; that is, the price a well-informed buyer would pay to a well-informed seller where neither is obliged to enter into the transaction (State v. Logan, 563 P.2d 811, 1977). It is obvious that neither the controlling statute nor Logan, supra, which interprets the statute, have any language pertaining to value which could possibly be used as a basis for instruction number eighteen. Appellant contends that the giving of this instruction was a misstatement of the law which resulted in prejudicial error.

Appellant also contends that court's instruction number twenty-two, for the same reasons as enumerated immediately above, is also erroneous and a misstatement of the law. Instruction twenty-two as given to the jury is as follows:

> You may find that a check is a writing which represents value to the owner. In determining the amount of value of a check you may consider the written face value of the check and the testimony of competent witnesses as to the value of the check.

This instruction obviously distorts the law by weighting the testimony of the State's witness and giving no legal credit to the evidence that appellant presented.

In a recent case, the court observed that even if defendant argued his theory to the jury (which did not occur in the present case) it would be no help where " the jury was misinformed about the law to be applied." (State v. Wanrow, 559 P.2d 548, at 555, 1977). To clarify the standard on review the court quoted a test set out in State v. Britton, (178 P.2d 341) which is to be applied to cases in which the instruction given is an erroneous statement of the law:

> When the record disclosed an error in an instruction given on behalf of the party in whose favor the verdict was returned, the error is presumed to have been prejudicial, and to furnish ground for reversal, unless it affirmatively appears that it was harmless...
>
> A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case. (Emphasis added) Id. at 555.

Applying this test to the instant case, it is evident that the errors in court's given instructions eighteen and twenty-two were not harmless and thus were clearly prejudicial to appellant's case. Thus, it is appellant's contention that these erroneous instructions constitute reversible error.

POINT III

APPELLANT WAS PREJUDICED WHEN, IN FINAL REBUTTAL, THE PROSECUTOR STATED THAT SHE HAD TAKEN GOOD NOTES DURING TRIAL AND PROCEEDED TO TESTIFY FROM HER NOTES AS A WITNESS BEFORE THE JURY.

This court recently reiterated the State's general policy that, although charged with vigorously enforcing the laws the prosecutor:

> "has a duty to not only secure appropriate convictions, but an even higher duty to see that justice is done. In his role as the State's represetntative in criminal matters, the prosecutor, therefore, must not only attempt to win cases, but must see that justice is done. Walker v. State of Utah, 624 P.2d 687, at 691. See also Codianna v. Morris, 594 P.2d 874, at 877 (1979).

During her final rebuttal, the prosecutor stated to the ju

> "Did he say he usually kept checks in his cash box in his inner office? I say he didn't. I wrote down these questions before I asked him and I wrote down his answers." (Emphasis added).

These statements of the prosecutor are clearly improper and amount t the giving of unsworn testimony.

In State v. Valdez(513 P.2d 422) the court pointed out tha

> "counsel for both sides have considerable latitude in their arguments to the jury, they have a right to discuss fully from their standpoints the evidence and the inferences and deductions arising therefrom. The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of thejurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks. 513 P.2d at 426.

Appellant contends that the statements by the prosecutor, amounting to unsworn testimony did fulfill the requirements of the test in Valdez (supra). Prosecutor's introduction of her own unsworn testi certainly called jurors attention to matter which they normally would not be justified in considering in determining their verdict. Considering prosecutor's status as the State's representative, it is highly likely that, under these circumstances, the jurors were influenced by those remarks.

Utah Code Annotated §77-42-1 (1953 as amended) sets out the standard for judgment on appeal:

> "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.

This statute was interpreted in State v. Eaton, 569 P.2d 1114 (1977) when the court stated that the question was whether, in light of the total picture, the prosecutors impropriety should be regarded as a prejudicial error and justify reversal of the conviction. The court noted that there should be no reversal merely to criticize a prosecutor who merely overstepped the bounds of propriety.

However, in the case at bar, the prosecutor's remarks were not merely an overstepped of the bounds of propriety, but were of a nature that could easily be seen as prejudical error. The court in Eaton, supra, specifically spelled out the standard to be met in cases of prosecutorial misconduct when it held:

> ". . .we believe that, on appeal, when there is a reasonable doubt as to whether the error below was prejudicial, that doubt should be resolved in favor of the defendant. . .consequently, the rule which we have numerous times stated is that if the error is such as to justify a belief that it had a substantially adverse effect upon the defendant's right to a fair trial, in that there is a reasonable likelihood that in its absence there may have been a different result, then the error should not have been regarded as harmless."
> 569 P.2d at 1116.

Adhering to this standard, it seems clear that the prosecutor's comments (in the present case) served to produce a substantially adverse effect on the appellant's right to a fair trial by adding testimony as a witness without appellant being able to

confront or cross examine her. Thus, appellant contends that her comments raised more than a reasonable doubt that her comments were prejudicial. The duty of the prosecutor was very aptly stated by Justice Sutherland in Berger v. United States, 295 U.S. 78, 79 L.Ed. 1314, 55 S. Ct. 629 (1935):

> ". . .It is as much his duty to refrain from methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfuly observed. (79 L. Ed at 1321).

Thus, it is appellant's contention that the prosecutor's comments were more than just improper, and that by, in effect giving unsworn testimony, she severely prejudiced the outcome of appellant's case.

CONCLUSION

Appellant contends that the court erred in not granting appellant's motion for a reduction of the charge after unrebutted testimony was presented which demonstrated that the checks were valueless.

Appellant also contends that the Court's instructions to the jury were an erroneous statement of the law. Appellant further contends that the court committed reversible error in failing to instruct the jury on appellant's theory of the case. Finally, it's appellant's contention that the prosecutor's misconduct in final rebuttal severely prejudiced the outcome of the case.

Thus, appellant asks that his conviction be reversed and judgment of acquittal be entered.

DATED this ___ day of June, 1981.

Respectfully submitted,

GINGER L. FLETCHER
Attorney for Defendant/Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114 this _____day of June, 1981.