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State of Utah v. Frederick Ray Sibert : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

FREDERICK RAY SIBERT,
Defendant and Appellant.

Case No.
8564

RESPONDENT'S BRIEF

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In the
Supreme Court of the State of Utah

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

FREDERICK RAY SIBERT,
Defendant and Appellant.

Case No.
8564

RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Appellant, Frederick Ray Sibert, was charged with and [after trial by jury in the Third Judicial District Court in and for Salt Lake County] convicted of, the crime of robbery.

Appellant comes now before this Court appealing from certain rulings of the trial judge relative to the admission of evidence and from the sentence imposed.

STATEMENT OF FACTS

At the trial, the complaining witness, Lyle Thomas Butters, testified regarding the facts surrounding the alleged robbery, and was cross-examined by counsel representing the defendant who sought to impeach the witness. The State then offered as a witness Police Officer John J. Ferrin, who testified to what the complaining witness had told him immediately following the alleged robbery. Ferrin testified from notes which he had taken at the time and these notes were offered and accepted into evidence. Counsel objected to Ferrin's testimony and to the admission of his notes.

On the 9th day of June, 1956, the Trial Judge sentenced the defendant to the indeterminate term as provided by law. The court denied the defendant probation.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE TESTIMONY OF OFFICER FERRIN.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE NOTES OF OFFICER FERRIN.

POINT III

IF THE COURT COMMITTED ERROR IN THE ADMISSION OF EVIDENCE SUCH ERROR WAS HARMLESS AND WAS NOT PREJUDICIAL TO THE SUBSTANTIVE RIGHTS OF APPELLANT.

POINT IV

IT WAS WITHIN THE DISCRETIONARY POWERS OF THE TRIAL JUDGE TO REFUSE TO GRANT THE APPELLANT PROBATION.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE TESTIMONY OF OFFICER FERRIN.

Briefly stated, the issue raised by appellant on appeal is whether it was proper for the Trial Judge to permit Officer Ferrin to testify as to a conversation had with the witness Butters immediately following the robbery. Counsel on cross-examination sought to impeach Butters by showing that his testimony at the trial was inconsistent with previous testimony given by him at a pre-trial hearing (R. 20-43). The alleged inconsistent statement related only to the color and model of the car used in the robbery. There was some further testimony that Butters had been shown a police report just previously to the trial.

There should be no question of a violation of the hearsay rule concerning this testimony of officer Ferrin's notes since they were not offered as proof of the matter stated therein but rather to refute the impeachment (R. 47-49).

With respect to evidence of this character the general rule is that prior statements of a witness, consistent with his testimony at the trial are not admissible in corroboration of his testimony unless the witness has been impeached and then only for the purpose of rehabilitating a witness. *State v. Fouts*, (1950) 221 P. 2d 841. Beyond this the courts are not in harmony and in some jurisdictions a number of exceptions apply to allow in prior consistent statements.

It is commonly held that when a witness's testimony has been discredited by an imputation of bias, prejudice or other motive to falsify, his consistent statements made at a time anterior to the date of the inconsistent statement tended to show that bias or prejudice did not motivate his testimony. *Sweazey v. Valley Transport, Inc., et al.*, (1940) 107 P. 2d 567. Prior consistent statements are also admitted in cases where the testimony of the witness is assailed as a recent fabrication. "It is the general rule in this state that where the opposition has assailed the testimony of a witness as being of a recent fabrication, an exception to the Hearsay Rule allows the admission of evidence of statements or conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, 'not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated something for

the purpose of the case.' " *People v. Walsh*, (1956) 301 P. 2d 247. See also *State v. Nieman*, (1939) 8 P. 2d 713.

It is difficult to see where harm would result in admitting a prior consistent statement provided it was made anterior to the alleged inconsistent statement, and provided it was made, as in this case, when the facts were fresh in the witness's mind. Here, through cross-examination, there was imputed to the witness Butters prior false statements. He made statements of fact at a pre-trial hearing of a certain nature and then at the trial after having been refreshed in memory by reviewing a police report he testified to different facts. Certainly it is only reasonable to admit statements made by the witness immediately following the robbery for the purpose of refuting the impeachment.

In a 1951 Connecticut trial a situation similar to the present case arose. A witness for the defendant in a personal injury action was impeached on cross-examination on the basis of a statement made by the witness to the plaintiff five years after the accident. Over objection, statements made by defendant's witness to other witnesses shortly after the accident were admitted for purpose of rehabilitation. In affirming the trial court the Supreme Court adopted the following reasoning:

"The defendant might well claim that the apparent inconsistency between the recent statement and the witness' testimony could be accounted for by lapse of memory and that his memory had been refreshed before he testified. That he had made a statement shortly after the event when

his memory was fresh which was in accord with his testimony, clearly was evidence which would tend to prove that the apparent inconsistency of his later statement was due to the fact that at the time he made it his memory had failed and had not been refreshed. With that explanation his testimony and his later statement could be reconciled and the apparent inconsistency be explained away." *Thomas v. Ganezer*, (1951) 78 A. 2d 539.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE NOTES OF OFFICER FERRIN.

During the course of direct examination of the witness Ferrin, certain penciled notes describing a conversation with the complaining witness Butters, over objection of counsel, were admitted into evidence and shown to the jury. The notes were written on five pages of small pad paper and were extremely brief.

Wigmore has outlined a general principle applying to situations of this nature. "If by verifying and adopting the record of past recollection the witness makes it usable testimony, and if by this verification alone can it become so usable, it follows that record thus adopted becomes to that extent the embodiment of the witness's testimony. Thus, (a) the record, verified and adopted, becomes a present evidentiary statement of the witness; (b) and as such it may be handed or shown to the jury by the party offering it." *Wigmore on Evidence*, 3rd Edition, Vol. III, Sec. 754, p. 97.

In a personal injury action in Maryland, a similar evidence issue arose. A police officer's report was admitted into evidence. It was ^{argued} ~~agreed~~ that the admission of such report was error in that it violated the Hearsay Rule. The Court of Appeals of Maryland said:

"There is no point to this exception, however, in view of the fact that the oral testimony of the witness, which, significantly, was offered on behalf of the defense, simply confirmed the statements in his written report. There was admittedly, no variance in any essential particular between this written and oral testimony, so that his oath became, in effect, the primary substantive evidence, relied upon. The witness's adoption of his written report made it his present assertion. . . . The ruling on this exception was, therefore, neither erroneous nor prejudicial." *Cogswell, et al. v. Frazier*, (1944) 39 A. 2d 815.

For a similar conclusion see *Ettelson v. Metropolitan Life Insurance Company*, 164 F. 2d 660.

POINT III

IF THE COURT COMMITTED ERROR IN THE ADMISSION OF EVIDENCE SUCH ERROR WAS HARMLESS AND WAS NOT PREJUDICIAL TO THE SUBSTANTIVE RIGHTS OF APPELLANT.

A review of the trial record and particularly of the testimony of Butters and Ferrin reveals that the portions of Ferrin's testimony objected to, and his notes, added nothing of substance to what Butters had already testified.

The latter positively identified the defendant, both on the stand and at a previous line-up, and he described the automobile used in the robbery. There was no dispositive evidence as to identity and the only points where inconsistency appeared were as to the color and model of the car, and these conflicts were certainly slight.

It is a basic principle of appellate review that a cause will not be reversed for error unless it affects the substantive rights of the party. The commission of error will not be presumed to have resulted in prejudice. Section 77-42-1, Utah Code Annotated 1953.

As late as 1953 the Supreme Court of the State of Utah said: "We will not reverse criminal causes for mere error or irregularity. It is only when there has been error which is both substantial and prejudicial to the rights of the accused that a reversal is warranted." *State v. Neal*, (1953) 262 P. 2d 756. A similar ruling was stated in *State v. Justensen*, 35 Utah 105, 99 P. 456.

It has been held that a party complaining of error in the admission of evidence has the burden of showing prejudice from that error. *Hunt v. Wooten, et al.*, (1953) 76 S. E. 2d 326. There has been no showing here that the admission of the evidence in question was of such a nature as to result in prejudice to the defendant.

In a federal case where the issue was similar to the case before this court it was concluded:

"We think that the question of the admission or rejection of evidence of prior consistent statements to sustain the credibility of a witness who has been

impeached by evidence of prior inconsistent statements is addressed to the sound discretion of the trial court, and that its ruling should not result in a reversal on appeal except where there has been a prejudicial abuse of discretion” *Affronti v. United States*, (1944) 145 F. 2d 3.

The admission of the disputed evidence, if error, did not prejudice the substantive rights of the appellant. The Utah Supreme Court held that the erroneous admission of evidence does not call for reversal of judgment, where the guilt of the accused is otherwise satisfactorily proved. *State v. Cox*, 74 Utah 149, 152, 276 P. 166.

POINT IV

IT WAS WITHIN THE DISCRETIONARY POWERS OF THE TRIAL JUDGE TO REFUSE TO GRANT THE APPELLANT PROBATION.

The primary consideration involved here is the meaning to be drawn from the applicable statute. The last clause of Section 77-35-17, Utah Code Annotated 1953, reads: “. . . and may place the defendant on probation for such period of time as the Court shall determine.” The intent of such wording is clearly to vest in the trial court discretion in the matter of probation.

In the case of *Dimmick v. Harris*, the Utah Supreme Court stated as a general rule that: “Whether one convicted of crime and subject to punishment therefore, should be placed on probation is a matter in such Court’s discretion”, 107 Utah 471, 155 P. 2d 170, Page 172.

(It should be noted that prior to 1943, the first sentence of what is now Section 77-35-17, Utah Code Annotated 1953, began: "Upon a conviction." At that date the phrase, "a plea of guilty or," was inserted between the words "upon" and "conviction." The reason for the amendment is not known.)

It is important to look to the wording adopted by the court in passing sentence.

"Now, I can't grant you probation *for several reasons*, one of which, of course, is that you deny your guilt in this matter," (R. P. 121) (*italics supplied*).

Further on the court said "In addition to that your record is not favorable and your attitude is not favorable to obtain probation and for that reason you are committed forthwith."

Thus the court mentions three reasons why the defendant was denied probation, i. e., an unfavorable record, an unfavorable attitude and a denial of guilt. After having presided over the trial and having become somewhat acquainted with the defendant, the court, acting within its discretionary power, felt that for several reasons it would not be compatible with the public interest to grant the defendant probation. This action was entirely within the Court's powers.

Appellant's contention seems to be that the effect of the Court's reasoning is to force the defendant to either testify against himself, or have probation denied him. But this assumes that the Court's only basis for denying proba-

tion was the plea of not guilty. This was not the situation here, the Court mentioned two other reasons.

In 1944 in a decision dealing with the interpretation of Section 77-35-17, Utah Code Annotated 1953, then Section 105-36-17, the following was stated:

“It is apparent that 105-36-17 *supra*, gives the court much greater latitude and power in suspending imposition of sentence than was previously had.

. . . Since the enactment of the statute this Court has held that ‘trial courts are not given authority to suspend sentences as a matter of favor or grace, but only when it appears compatible with public interest.’ . . . From the construction of the statute it is evident that the legislature intended trial courts should have considerable authority to reform wrongdoers. . . . The right to suspend imposition of sentence and the right to place one on probation is a discretionary right.”

CONCLUSION

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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