

1957

State of Utah v. Frank DeLano Gay et al : Petition for a Rehearing on Appeal

Utah Supreme Court

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IN THE SUPREME COURT OF
THE STATE OF UTAH

UNIVERSITY UTAH

OCT 31 1957

THE STATE OF UTAH,)
Respondent,)

LAW LIBRARY

-VS-

Case No.

FRANK DELANO GAY,)
OLIVER TOWNSEND &)
WILLIE OLEN SCOTT,)
Appellants.)

8565.

FILED

FEB 25 1957

Clerk, Supreme Court, Utah

PETITION FOR A REHEARING ON APPEAL.

FRANK DELANO GAY,
OLIVER TOWNSEND &
WILLIE OLEN SCOTT.

In Propria Persona,
Box 250, Draper, Utah.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,)

Respondent,)

-VS-

Case No.

FRANK DELANO GAY,)

8565.

OLIVER TOWNSEND &)

WILLIE OLEN SCOTT,)

Appellants.)

PETITION FOR A REHEARING ON APPEAL.

Comes now before this Honorable Supreme Court of the State of Utah, the Appellants herein, and pray that it shall Order a Rehearing of their case on Appeal, for the following reasons:

FIRST.— Appellants submit that this Honorable Court's disposition of their contention that their conviction obtained by the knowing use of ' PERJURED ' Evidence is without ' Due Process of Law ', is erroneous, and contrary to the well established Decisions of the Supreme Court of the United States.

SECOND .- Appellants submit that this Honorable Court is in error in holding that a Client-Witness may be forced to disclose, what were of necessity privileged confidential conversations he had with his Attorneys, as such, made in preparing his case for Trial.

THIRD .- Appellants submit that this Honorable Supreme Court's upholding the error of the Trial Judge, in leaving the Courtroom unajourned as harmless, is against the weight of the Authorities, especially those cited by this Honorable Court at mid page Two of it's Opinion That this error of the Trial Court, coupled with others was instrumental in Denying to the Defendants their Constitutional Right to a 'Fair Trials', and is reversible error.

FOURTH .- Appellants take issue with this Honorable Court's statement at the end of it's Opinion that:

" Other contentions of defenants do not merit discussion. "

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Appellant's contend that their ' other contentions' did merit discussion, and are good grounds for Reversal; That the Decision of this Honorable Court, which did NOT respond to or consider several meritorious contentions presented to it on matters very prejudicial to Appellant's, which Denied them their Federal Constitutional Right to a 'Fair Trial is erroneous and contrary to recent decisions of this Honorable Supreme Court of the State of Utah;

The First of these contentions is the matter of the introduction of very prejudicial 'HEARSAY' testimony and Exhibits against the Appellant's , contrary to the ruling establishe by this Honorable Court in the comparable case of - STATE v. NICHOLS (Utah 1944) 145 P. 2d 802 cited at page 39 of Appellant's Brief;

The Second contention that was submitted to and ignored by this Honorable Supreme Court is the matter of the ' INSTRUCTIONS' given and refused by the Trial Court on the Defense

of ' ALIBI ', which resulted in the Appellant' being DENIED their Constitutional Right to a 'FAIR TRIAL' under Instructions giving the LAW applicable to the evidence in the case. Appellant's submit that the case of - STATE v. WHITELEY, 100 Utah 14, 110 P. 2d 337, cited at page 42 of Appellant's Brief, is ample authority that this case should be Reversed because of the Instructions given and refused.

For the foregoing reasons set forth, and which are hereinafter set forth in detail in comparison with the Opinion of this Honorable Supreme Court rendered on the 24th day of January, 1957, against Appellant's; They submit that upon the Authorities hereinafter submitted, that they are entitled to a Rehearing on Appeal of their case, and a Reversal of the Trials Court's Judgment or a New Trial in which their Legal and Constitutional Rights shall be respected.

ARGUMENTS AND AUTHORITIES .

FIRST .- As to Appellant's contention that this Honorable Court is in error in upholding their conviction tainted with PERJURED testimony This Honorable Court states at top middle of page 1 of it's Opinion that :-

" Complaint is made that conviction of defendants was obtained by the use of perjured testimony which was known to be untrue. It must be conceded that the record contains some testimony which appears to have been recklessly given and some which would appear to be incorrect since with respect to some testimony some of the state's witnesses contradict other witnesses for the state. However, we are not constrained to attach any particular significance to the testimony since it is apparent that it could not have prejudiced the rights of defendants.

The question of credibility of the witnesses is for the jury. The contradictions were settled by their verdict.

This Honorable Court evidently wishes to avoid the use of the word 'PERJURY ', by it's use of the words:

".. the record contains some testimony which appears to have been recklessly given and some which would appear to be incorrect since with respect to some testimony some of the state's witnesses contradict other witnesses for the state. "

But such words cannot conceal the fact that certain State's witnesses lied on the witness stand and committed ' PERJURY ', as proven by the contradictory testimony of other STATE'S witnesses; In particular it is proven, as set forth in Appellant's Brief pages 26 to 28 and Reply Brief of Appellant's pages 3 to 9, that Mr. CHRISTENSEN, the sole complaining witness, committed PERJURY as proven by the testimony of State's Witness Detective DUNCOMBE, and without the PERJURY tainted testimony of Mr. CHRISTENSEN, the entire case against the Appellants must fall, for he is the complaining witness, the only one to describe the so-called Robbery of himself by Appellants; The Information in this case (Trans. pages 10 and 13) charges that the Appellants:-

"... robbed Ronald William Christensen. " the same overzealous Mr. CHRISTENSEN who PERJURED himself on the witness stand. Aside from the very prejudicial 'Hearsay' testimony of State's Witness Mr. HUNTER, who

PERJURED himself by repeatedly testifying to an impossible date, as set forth in Appellant's Brief pages 27-28 and Reply Brief of Appellant' pages 9-10; The fact remains that the entire case against the Appellants is based solely on the testimony of Mr. CHRISTENSEN, the complaining witness, whose testimony is tainted with proven PERJURY, so that it CANNOT in any way be said that his testimony could not have prejudiced the rights of the Appellants. But this Honorable Court evidently has ignored this fact, for it states:-

2 The contradictions were settled by their (the jury's) verdict. "

But the Supreme Court of the United States, in the trail blazing case of -- MOONEY v. HOLOMAN, 294 U. S. 103, 55 S. Ct. 340 79, L. Ed. 791, HELD that a conviction that was obtained by the use of 'Perjured' Evidence was NOT 'Due Process of Law', but a mere pretense of a trial.

Twenty-two years have passed since the Mooney case, supra, but the principles expounded

therein have grown stronger with the years, so that at the present time the Supreme Court of the United States unequivocally holds that any conviction tainted with any PERJURED testimony can NOT stand, that the Perjur'd testimony cannot be separated, and the conviction upheld on other evidence; Nor can it be held that the Perjured testimony did not prejudice the rights of the defendants, but the case must fall as a whole.

IN COMMUNIST PARTY v. SUBVERSIVE ACTIVITIES
CONTROL BOARD (April 30, 1956) 76 Sup Ct.
Rep. 663, at mid left of page 663, the
Supreme Court of the United States HELD:

" (4) When uncontested challenge is made that a finding of subversive design by petitioner was in apt the product of three perjurous witnesses, it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. We cannot pass upon a record containing such challenged testimony.
(cont.).....

(cont.)..." We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it. Since reversal is thus demanded, however, we do not reach the constitutional issues.

"

In MESAROSH v. UNITED STATES(November 5, 1954

77 Sup. Ct. Rep. 1, at top right of page 5,

the U. S. Supreme Court said and Held:

" (1) Either this Court or the District Court should accept the statements of the Solicitor General as indicating the unreliability of this Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to be correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible. The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial. "

And at left side page 7, (77 S. Ct.) the

U. S. Supreme Court continued:

" . . . Here, on the other hand, in a criminal case, the original finder of facts was a jury. The district judge is not the proper agency to

(cont.)...

(cont.).. " determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only a jury can determine what it would do on a different body of evidence, and the jury can no longer act in this case. For this reason, as well as that stated in the preceding paragraph, if on a remand the District Court should rule that the verdict against some of the petitioners could stand, we would be obliged, on a subsequent appeal, to reverse and, at that late date, direct that a new trial be granted.

" "

The Appellants submit that the foregoing cases cited supra, are the 'Law of the Land' on cases involving 'Perjured Testimony', and that the instant case should be reversed in accordance therewith.

- - - - -

SECOND.- As to Appellant's contention that this Honorable Court is in error in holding that a Client Witness may be forced to disclose his confidential conversations with his Attorneys made in preparation for Trial. Near the bottom of page 1 of it's Opinion, this Honorable Supreme Court states:

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" Certainly defendant did not communicate to his attorneys information intended to be confidential. "

Perhaps the writer of the Court's Opinion in the instant case did not realize the far-reaching implications of this statement, for it in effect holds that nothing a Client may say to his Attorney in giving him the data and information needed to prepare for Trial is confidential; As every Attorney knows, in nearly every case, a lot of verbal information must be correlated and condensed down before it is put into writing in the form of an Affidavit or Notice; And Appellants submit, all such conversations, other than those expressly used in such Affidavit or Notice, should be considered privileged communications made in preparation for Trial.

As stated by the Supreme Court of the United States, in the leading case of- HICKMAN v, TAYLOR, 329 U. S. 495, 67 S. Ct. 385 at 393, this is the " Work Product of the Lawyer", and is free from intrusion by opposing parties.

THIRD .- In regards to this Honorable Court's upholding the action of the Trial Judge in leaving the courtroom unajourned, in effect turning the proceedings over to the District Attorney, to thereby impress the jury and prejudice them against the Appellants, they submit again that the Trial Judge by his action lost jurisdiction of the proceedings, and even if the record shows no objections made by them against this unauthorized conduct, considering that they could not voice their objections to an empty Bench, still the Appellants submit that such action should be condemned by the only effective way possible, by a Reversal of this case; In it's Opinion at mid page Two to page Three this Court cites the Authorities of 3 Am. Jur., Title Appeal and Error, Sec. 1058, page 607; and the case of RIDENOUR v. STATE (Okl.Crik. 1951) 231 P.2d 395, both of which roundly condemn such practice as reversible error.

Appellants submit that their failure to object

to such unauthorized conduct on the part of the Trial Judge is not a waiver of their rights. In the case of STATE v. MANNION, 19 Utah 505, 57 Pac. 542, at 543, 45 L. R. 2A. 638, 75 Am. St. Rep. 753, this Court HELD:

" . . . That which the law requires and and makes essential in the trial of persons accused of a felony cannot be dispensed with, either by the consent of the accused or by his failure to object to unauthorized methods pursued by those in authority. "

Appellants submit that they were entitled to a 'Fair Trial', before an impartial jury, held under control of the trial judge at every stage of the proceedings; That the trial judge by his action in leaving the courtroom without admonishing the jury, ignoring defense counsel and telling the District Attorney- " You may proceed." thereby espoused the side of the State and prejudiced that of the defendants in the eyes of the jury, and such action, the Appellants contend, does not furnish the basis for a 'Fair Trial'.

FOURTH.- Appellants take issue with this Honorable Court's statement at the end of it's Opinion that:

" Other contentions of defendants do not merit discussion.

Appellants contend that their ' other contentions' DID merit discussion, and are good grounds for Reversal of this case, that this Court is on error in not considering them.

Under their POINT TWO, at page 36 of Appellants' Brief, they urged the following assignment of error:

" (v) The Trial Court erred in admitting, and in not cautioning the jury to disregard, the large amounts of 'HEARSAY' Evidence and comments of State's counsel, thus depriving the Defendant's of their Constitutional Right to a 'Fair Trial' by an 'Impartial Jury' on Legal Evidence.

Among other things under this assignment, Appellants pointed out in their Appellant's Brief, pages 38-39, how Mr. NORMAN HUNTER, the witness who PERJURED himself by repeatedly testifying to an impossible date, in his zeal to convict the defendants at any cost, was allowed to contribute large amounts of very prejudicial 'HEARSAY' testimony. Starting at Reporter's Transcript page 190, line 18, he was allowed to testify to a 'conversation' he allegedly had, which was never verified, that as a result thereof he made a search of Rufe Anderson's farm in Oklahoma, where he stated he found a , 45 pistol under a pile of hay, which was in NO way ever connected with defendant; Yet Mr. HUNTER was allowed to continue describing the gun, the shells and clips, which were handled back and forth before the Jury (Rep. Trans. pp. 191, 192.) that they were marked as Exhibits (9), (10) & (11) and offered as Evidence (Rep. Trans. page 194) to which objection was made. At Rep. Trans. page

202-203, Mr. HUNTER claimed that defendants were traveling around 'wearing guns' but admitted that he didn't know anything about it, that it was just something that he had been told. Meanwhile Exhibits (9), (10) & (11), the gun, shells and clips lay in front of the Jury through the questioning of several more witnesses, and finally at Rep. Trans. page 222, lines 1 to 13, the Court refused to admit them as evidence, but the gun, etc. were allowed to remain in front of the Jury, and were not withdrawn until after the Jury had been given their Instructions and retired, then as shown at bottom of Rep. Trans. page 223, -top page 229, they were released back to the District Attorney, after they had done their damage by being placed in front of the Jury as evidence against the defendants, accompanied by a lot of very prejudicial 'HEARSAY' testimony, none of which the jury was cautioned to disregard. Appellants submit that this very prejudicial 'HEARSAY' evidence and

Exhibits of gun, shells, etc. rendered a 'Fair Trial' by an Impartial Jury impossible.

Appellants wish to call attention to the fact that the foregoing contentions were in no way disputed by the Attorney General in his Respondent's Brief in this case.

And Appellants wish to call this Court's attention to the fact that in the nearly identical case of STATE v. NICHOLS (Utah 1944) 145 P. 2d 802, in which a 'gun' was sought to be connected with a defendant by this same kind of 'HEARSAY' testimony, that this Court said at page 803:

" The damage was already done by this incompetent testimony, as will be observed from a detailed examination of all the testimony, and evidenced by the verdict returned by the jury. Even had the trial court explained its incompetency to the jury and instructed them expressly to disregard it, it is doubtful that the injurious effect could have been overcome. "

Appellants submit that they have the same question of LAW in regard to 'HEARSAY' testimony as was present in the NICHOLS case, supra, and it was error for this Court to ignore it.

The next contentions of Appellants that were submitted to and ignored by this Honorable Court, were the matters of the Trial Court's Instructions given and refused.

In their Appellant's Brief, under POINT TWO, they submitted assignment (vi) at page 40, and the argument thereon continues to page 41 where they presented assignment (vii) which continues to page 44, where they presented assignment No. (viii) on the Trial Court's Instructions No's 4, 5 and 6, respectively.

At page 44 of Appellant's Brief they submit assignment (ix) complaining of the Trial Court's refusal to give defendant's requested Instruction No. 1. The Appellant's Brief, pages 40 to 45 gives all arguments necessary on the matters of Instructions given and refused, and Appellants submit that it was error for this Court to ignore these contentions on the LAW of the case.

Perhaps if these same contentions had been prepared by an Attorney of repute, this Court would have given them more consideration; But the Appellants realize only too well that they are only poor negroes, in prison with no Attorney to prepare their printed Briefs, but must do the best they can with whatever material they have available; But they do ~~not~~ believe nevertheless, that they are entitled to their share of Justice, and therefore pray that this Honorable Court shall grant them a Rehearing of their case on Appeal and grant them a new trial.

Very Respectfully submitted by:

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