1982

State of Utah v. Raymond Joe Vigil : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18118
RAYMOND JOE VIGIL,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from convictions of Aggravated Robbery and Attempted Criminal Homicide in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, Judge, presiding.

DAVID L. WILKINSON
Attorney General
ROBERT N. PARRISH
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

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Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Respondent

BROOKE C. WELLS
Salt Lake Legal Defender Assoc.
333 South 200 East
Salt Lake City, UT 84111

Attorney for Appellant

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STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of aggravated robbery, a first-degree felony, in violation of Utah Code Ann., § 76-6-302 (1953), as amended, and attempted criminal homicide, a second-degree felony, in violation of Utah Code Ann., § 76-5-203 (1953), as amended.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty on both charges on October 21, 1981 in the Third Judicial District, the Honorable Peter F. Leary presiding. Appellant was sentenced October 21, 1981 to an indeterminate term of five years to life in the Utah State Prison for the aggravated robbery conviction, and to an indeterminate term of not less than one year and not more than 15 years in the Utah State Prison for the attempted criminal homicide conviction.

Each of these sentences is to run concurrently with the sentence the appellant is presently serving.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of appellant's convictions and sentences.

STATEMENT OF THE FACTS

On July 26, 1981, a Pinto car owned by Tracy Neely from Idaho, who was visiting appellant, was observed at about 1 a.m. at a Winchell's Donut Shop at 1465 South State Street in Salt Lake City (T. 43). Two male Mexican-Americans with stocking masks over their heads entered the donut shop (T. 43). Robert Sherwood and George Bowie were discussing a fishing trip at a nearby motel; they recognized the probable criminal activity and telephoned the police (T. 43-44).

The masked men, one of whom was carrying a firearm, went behind the counter inside the donut shop, held the gun in the baker's face and ordered the baker to open the cash register (T. 5). The baker was hit in the mouth with a fist before he was able to open the cash register, after which he was told to lie on the floor with his face down (T. 5). The men took $136 out of the cash register (T. 6), left the store, "ran to a corner street, made a right turn and disappeared" (T. 44).

Rick Lewis, a police officer, was patrolling in a marked patrol car near the area of the donut shop and received information from a police dispatcher that the robbery suspects were driving a yellow Pinto car (T. 51). The officer noticed a Pinto car matching the description as he approached a stop light at the intersection of 1700 South and State Street (T. 52). He followed the Pinto car as it headed west, radioed for assistance (T. 52), and followed the Pinto car as it turned north onto Jefferson Street, which became a dead end street after a short distance (T. 53). The officer activated the patrol car's overhead lights and the Pinto car stopped (T. 55). Another police officer, Terry Opheikens, arrived in another patrol car and stopped adjacent to Office Lewis' car (T. 56).

Using the patrol car's public address system, Officer Lewis instructed the Pinto car's occupants to roll down the car's windows and extend their hands into Lewis' view (T. 56). The passenger on the right side of the car attempted to get out of the Pinto, but Lewis told him to remain inside, after which the Pinto's engine was started and the car accelerated down the street (T. 57). The officers pursued with their vehicles; they noticed that the Pinto had reached the dead end, had turned around, and was headed toward them; and the officers set up a roadblock with the patrol cars (T. 58-59). As the Pinto approached the roadblock, a firearm

from the passenger-side window was pointed at Lewis, who drew his revolver and fired six shots at the Pinto (T. 60). Several shots were fired at Lewis from the Pinto car (T. 61).

Because of the distance between Lewis' and Opheikens' cars, the Pinto broke through the roadblock after striking Opheikens' patrol car (T. 61). The Pinto proceeded down the street a short distance before stopping, with the three occupants exiting and running onto the driveway of a private residence (T. 62). A search of the area uncovered the appellant, who was hiding under aluminum sheet metal near a garage in the back yard of a private residence (T. 65). Leo and Rudy Duran were found in a nearby field, lying face down on top of a shaving kit which contained two money envelopes with about $135, a pair of panty hose with one of the legs cut off and a pair of gloves (T. 143-146). A revolver with four empty cartridges was also found in shrubbery by a fence in the backyard of the residence near where appellant was hiding (T. 123).

Leo and Rudy Duran pled guilty to attempted criminal homicide, and were sentenced to indeterminate terms of not less than one year and not more than 15 years at the Utah State Prison. Appellant was tried by a jury and convicted of attempted criminal homicide and aggravated robbery, convictions from which he now appeals.

ARGUMENT

THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENTS ON THE GUILTY PLEA OF A DEFENSE WITNESS WERE RESTRICTED TO THE EVIDENCE ADMITTED AT TRIAL AND WERE NOT IMPROPER.

The appellant does not argue insufficiency or other defects in the evidence produced against him at trial. His only claim concerns the closing arguments made by the prosecutor and the limits imposed by the trial judge on the closing arguments of appellant's counsel. Appellant's claim focuses on the testimony of defense witness Leo Duran.

After the prosecution had presented its case in chief, the defense called Leo Duran as a witness. During direct examination by defense counsel, Duran testified as follows:

Ms. Wells: Leo, have you recently entered a plea of guilty to any charges having to do with the charges that are now facing Mr. Vigil?

Leo Duran: Yes.

Ms. Wells: What have you entered a plea of guilty to?

Leo Duran: Attempted criminal homicide.

Ms. Wells: Was that a result of any plea negotiations with the State?

Leo Duran: Yes.

Ms. Wells: What else were you charged with?

Leo Duran: Aggravated robbery.

Ms. Wells: And what happened when you entered a plea of guilty to the attempted criminal homicide? What happened to the other case?

Leo Duran: They dropped it.

Ms. Wells: Have you been sentenced on that matter yet?

Leo Duran: Yes.

Ms. Wells: What sentence did you receive?

Leo Duran: I received a 1-to-15.

Ms. Wells: What does that mean?

Leo Duran: I will be sent to the prison to do my time.

Ms. Wells: Are you presently in custody awaiting transference to the prison?

Leo Duran: Yes.

Ms. Wells: Now, Leo, other than an attempted criminal homicide which you have just spoken about, have you been convicted of any other felony offenses?

Leo Duran: In the past?

Ms. Wells: Yes, in the past.

Leo Duran: Yes.

Ms. Wells: What was that? As an adult.

Leo Duran: Attempted aggravated burglary.

Ms. Wells: When was that?

Leo Duran: Five-six years ago.

(T. 152-153).

Duran testified that he and Rudy Duran, Leo's brother who also pled guilty to attempted criminal homicide, had robbed the Winchell's Donut Shop (T. 155-158), and afterwards they returned to a party where appellant was (T. 158). Duran further stated that he, Rudy and appellant then decided to visit a friend in a hospital (T. 158-159). While driving to the hospital, Duran said a police officer stopped them (T. 160). On cross-examination by the prosecutor, Leo Duran admitted that his testimony was the first time he had told anyone about this version of the events on July 26, 1981 (T. 177).

After the prosecution and defense had presented their evidence, the prosecutor made his closing arguments. During the defense counsel's closing argument, she commented on the plea bargains of Rudy and Leo Duran. Defense counsel stated:

> Now, we know that an aggravated robbery occurred. We know that two persons committed that aggravated robbery. Yet, we also know that Mr. Leo Duran did not plead guilty to the crime of aggravated robbery.

(T. 199-200). The prosecutor objected to these comments. The trial court sustained the objection and admonished the jury to disregard the comments (T. 200).

During rebuttal to the defense attorney's closing arguments, prosecutor Mr. Jones stated:

> Finally, ask yourselves this question: If there was no attempted homicide in this case, no evidence of an attempted homicide, why is it that Leo Duran walked into court yesterday and took the stand and told you--
> (At this point, defense counsel objected but the trial judge asked the prosecutor to continue.)
> Why is it that Mr. Duran took the stand in this case and told you that he pled guilty to that offense of an attempted homicide? That fact should inidicate to you that there was an attempted homicide in this case. It is absolutely contrary to defense counsel's argument.

(T. 218-219).

After the jury left the room, defense counsel moved to dismiss, stating:

> . . . in that during my closing argument my attempt to explain the position of Leo and Rudy Duran . . . my comments were objected to and the Court sustained that objection. I immediately desisted from that.
>
> However, Mr. Jones [the prosecutor] in his argument did make comment with regard to the plea bargain and Mr. Duran's having pled guilty to an offense and that he pled guilty to it because he was guilty of it. I believe that was in error and highly prejudicial, and if nothing more he should not have been allowed to proceed.

The trial court denied the motion (T. 221).

Appellant attempts to characterize the closing arguments of the prosecutor on the Duran brothers' guilty pleas as similar to the closing arguments made by the appellant's attorney. Because the judge allowed the closing arguments of the prosecutor, appellant claims that it was

then prejudicial to limit the defense attorney's arguments on Leo and Rudy Duran's guilty pleas.

A review of the prosecutor's closing arguments on the guilty pleas reveals that he was simply restating to the jury the testimony of Leo Duran. Mr. Duran, a defense witness, stated on direct examination that he had pled guilty to attempted criminal homicide, a charge arising out of the same circumstances that were facing appellant (T. 152). The prosecutor in closing argument said that Leo Duran pled guilty to attempted criminal homicide, which indicated that there was an attempted criminal homicide. Pleading guilty to a crime is equivalent to admitting that Duran committed the crime; he had admitted facts that supported the crime charged. State v. Harris, Utah, 585 P.2d 450 (1978).

Appellant cites Lewis v. State, 569 P.2d 486 (Okla. 1977) for the proposition that the prosecutor could not tell the jury that a guilty plea means admitting the facts without also telling the jury "the ramifications of the Durans' respective pleas" (appellant's brief, p. 8). The Lewis case is clearly distinguishable from the present case because Lewis involved improper closing arguments by the prosecutor who gave his opinion on the guilt of defendant before defendant's guilt had been decided by repeatedly stating the defendant had lied. In the present case, the prosecutor did not give his opinion

of appellant's guilt and the guilt of Leo Duran had been previously decided. Leo Duran's guilt was no longer at issue, as was that of the defendants in Lewis v. State, supra.

It is the prerogative and the duty of either counsel to analyze all aspects of the evidence and to make any pertinent statements or deductions reasonably to be drawn therefrom as to what the evidence is or is not and what it does or does not show. State v. Kazda, Utah, 540 P.2d 949 (1975). A prosecutor has the duty and right to argue the case based on the total picture shown by the evidence or the lack thereof. State v. Hales, Utah, ____ P.2d ____ (Case No. 18083, decided July 7, 1982); State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973). Counsel for both sides have considerable latitude in their arguments to the jury, and have the right to discuss fully from their standpoints the evidence, inferences and deductions arising therefrom. State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973); State v. Gaxiola, Utah, 550 P.2d 1298 (1976). The Utah Supreme Court in Valdez, at 426, stated:

> 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 the jurors 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. The

> determination of whether the improper remarks have influenced a verdict is within the sound discretion of the trial court on motion for a new trial. If there be no abuse of this discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment.

Under the Valdez test, it is clear that the prosecutor did not call to the attention of the jurors in the instant case matters which they would not be justified in considering to determine the appellant's guilt. The prosecutor made a common sense observation of fact that the jurors could not fail to notice: that Leo Duran pled guilty to attempted criminal homicide and that the crime actually did occur. The prosecutor did not say or insinuate that the statement was based on personal knowledge or on anything other than Leo Duran's testimony given before the jury. The prosecutor did not indicate his opinion of the appellant's guilt.

A review of defense counsel's arguments shows that she committed error, not the prosecutor. Appellant cites Valdez and Gaxiola, both supra, for the proposition that both sides can argue the evidence, and inferences and deductions arising therefrom. This is a correct statement of the Utah case law; however, the defense attorney was not discussing the evidence, inferences or deductions. Defense counsel was attempting to introduce new evidence, to wit: reasons for the Durans' guilty pleas.

Plea discussions and plea agreements are not admissible either for or against the appellant in any judicial proceeding. United States v. Smith, 525 F.2d 1017 (10th Cir. 1975); United States v. Ross, 493 F.2d 771 (5th Cir. 1974); State v. Byrd, 453 P.2d 22 (Kan. 1969); People v. Hamilton, 383 P.2d 412 (Cal. 1963). Admitting plea discussions into evidence would in effect defeat the purpose of plea bargains. Using plea bargaining statements in later proceedings will discourage people charged with crimes from entering guilty pleas when plea negotiations could be used against them in later proceedings. Defense counsel in this case attempted to introduce evidence of plea bargaining, which is improper. The trial judge correctly prevented defense counsel from introducing the reasons for the Durans' guilty pleas.

In addition, there was no evidence at trial for the reasons the Durans pled guilty. An attempt to introduce statements by defense counsel about the guilty pleas constitutes unsworn testimony. Comments by counsel which are outside the record and therefore not based on the testimony and issues of the trial are generally regarded as unsworn testimony and improper. Hotel Riviera, Inc. v. Short, 396 P.2d 855 (Nev. 1964); Fitzgerald v. State, 219 P.2d 1024 (Okla. Crim. App. 1950); People v. Houghton, 212 Cal. App. 2d 864, 28 Cal. Rptr. 351 (Cal. Dist. Ct. App. 1963); People v. Wright, 232 N.Y.S.2d 767 (N.Y. App. Div. 1962).

In the instant case defense counsel was attempting to testify to matters not in evidence rather than advocating her client's cause. If the defense attorney would have wanted to testify as a witness, she should have been sworn and have given the prosecutor an opportunity to cross-examine her. The defense attorney was properly prevented by the trial judge from commenting on matters not testified to at the trial.

Defense counsel's closing arguments and attempts to comment on plea bargaining of Leo and Rudy Duran are also improper because the comments attempt to vouch for the credibility of Leo Duran. The introduction of unsworn matters during closing arguments is an attempt to bolster Leo Duran's testimony. These attempts to bolster the testimony of Leo Duran were calculated to induce the jurors to believe that the defense attorney knew Leo Duran's reputation for truth and was therefore entitled to absolute credence about everything Leo Duran said.

Defense counsel attempts to bolster the credibility of Leo Duran by proffering reasons why Duran had pled guilty other than that a crime had occurred. Defense counsel has a right to argue the credibility of a witness when counsel confines that argument to the evidence and fair inferences that arise therefrom, but defense counsel has no right to search beyond the record and state extraneous facts either in support or in derogation of a witness' credibility. State v.

Wilson, 554 S.W.2d 511 (Mo. Ct. App. 1977); People v. Poe, 183 N.W.2d 628 (Mich. Ct. App. 1970); State v. Braathen, 43 N.W.2d 202 (N.D. 1950); Sequin v. Hauser Motor Co., 350 So.2d 1089 (Fla. Dist. Ct. App. 1977); Riddle v. State, 363 S.W.2d 264 (Tex. Crim. App. 1963).

Moreover, the determination whether improper remarks, if any, of counsel during arguments to the jury have influenced a verdict lies within the discretion of the trial court. State v. Bautista, 30 Utah 2d 112, 514 P.2d 530 (1973). If there is no abuse of discretion and substantial justice appears to have been done, the appellate court will not reverse the judgment. State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973). Appellant in this case has not shown that he was prejudiced. Appellant speculates why the Durans pled guilty, none of the speculations being in evidence at trial. More importantly, appellant has not shown that these speculations on a witness' guilty plea would have influenced the jury's mind as to the guilt of appellant. The issue at trial was whether appellant was guilty, not whether a witness could plead guilty for reasons other than that the witness committed the crime.

There was no prejudice to appellant in this case. The evidence was clear and decisive, and the trial court's judgment should be upheld, notwithstanding any alleged misconduct on the part of the prosecutor or the trial judge. See State v. Patterson, Utah, ____ P.2d ____ (Case No. 17610, decided November 5, 1982).

A Winchell's Donut Shop was robbed at about 1 a.m., with several witnesses testifying to the details of the robbery and the robbers' car. Shortly thereafter, police officers attempted to stop a car matching the description of the robbers' get-away vehicle. The three occupants, appellant and Leo and Rudy Duran, resisted the arrest and fired several shots from a revolver as the car broke through the police officers' roadblock. The three occupants of the car were found near the abandoned car.

The evidence in this case is overwhelming. The jury's verdict was not affected by the trial court's refusal to allow the defense attorney to comment during closing arguments on a witness' guilty plea. The jury was not misled thereby into doing something it would not otherwise have done.

CONCLUSION

The prosecutor's closing arguments were properly limited to the evidence admitted at trial. Defense counsel, however, attempts to show prejudice to appellant because defense counsel was not allowed to comment on Leo Duran's guilty plea during closing argument. The trial judge did not commit reversible error because defense counsel was attempting to introduce new evidence. Plea negotiations, which defense counsel attempted to argue in her closing statement, cannot be admitted at trial. Defense counsel also cannot bolster the

testimony of witnesses during closing argument Furthermore, because the evidence is overwhelming in this case, appellant has not shown that there was prejudice in limiting defense counsel's closing argument or that the jury would have been influenced otherwise.

Based upon the foregoing, respondent urges that the convictions and sentences of appellant be affirmed.

Respectfully submitted this 16th day of November, 1982.

DAVID L. WILKINSON
Attorney General

Robert N. Parrish

ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Brooke C. Wells, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 17 day of November, 1982.

Susan Patton