1989

State of Utah v. Robert E. Jones : Reply Brief

Utah Supreme Court

R. Paul Van Dam; attorney general; Sandra L. Sjogren; assistant attorney general; attorneys for respondent.
Robert L. Foerer; attorney for appellant.

BRIEF

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff/ Respondent, vs. ROBERT E. JONES, Defendant/ Appellant.	REPLY BRIEF OF APPELLANT Case No. 890533 Category 1

Appeal from jury conviction on charges of Murder in the First Degree, a Capital Offense; Aggravated Burglary, a First Degree Felony; and Attempted Murder in the Second Degree, a Second Degree Felony, in the Second Judicial District Court, County of Weber, State of Utah, the Honorable David E. Roth, Judge, presiding.

Robert L. Froerer (#4574)
THE WEBER COUNTY PUBLIC
DEFENDERS ASSOCIATION, INC.
2568 Washington Boulevard
Ogden, UT 84401
Telephone: 392-8247

Attorney for Defendant/
Appellant

R. Paul Van Dam
ATTORNEY GENERAL
Sandra L. Sjogren
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Plaintiff/Respondent

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff/ Respondent, vs. ROBERT E. JONES, Defendant/ Appellant.	)	REPLY BRIEF OF APPELLANT Case No. 890533 Category 1

Appeal from jury conviction on charges of Murder in the First Degree, a Capital Offense; Aggravated Burglary, a First Degree Felony; and Attempted Murder in the Second Degree, a Second Degree Felony, in the Second Judicial District Court, County of Weber, State of Utah, the Honorable David E. Roth, Judge, presiding.

Robert L. Froerer (#4574)
THE WEBER COUNTY PUBLIC
DEFENDERS ASSOCIATION, INC.
2568 Washington Boulevard
Ogden, UT 84401
Telephone: 392-8247

Attorney for Defendant/
Appellant

R. Paul Van Dam
ATTORNEY GENERAL
Sandra L. Sjogren
Assistant Attorney General
236 State Capitol
Salt Lake City, UT 84114

Attorneys for Plaintiff/Respondent

TABLE OF AUTHORITIES

Cases

TABLE OF CONTENTS

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH, Plaintiff/ Respondent, vs. ROBERT E. JONES, Defendant/ Appellant.	REPLY BRIEF OF APPELLANT Case No. 890533 Category 1

JURISDICTION AND NATURE OF PROCEDURES

This is the Reply Brief of Appellant filed pursuant to Rule 24(c), Rules of the Utah Court of Appeals.

ARGUMENT

Defendant agrees that the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984), addressing the issue of ineffectiveness of counsel, applies in this case. Those prongs are, as indicated previously: (1) a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed to Defendant by the Sixth Amendment of the U. S. Constitution, and that such deficient performance prejudiced the defense, and (2) a showing of a reasonable probability that the result of the proceeding would have been different but for counsel's

unprofessional errors; reasonable probability being defined as probability sufficient to undermine the confidence of the outcome. Strickland, 466 U.S., at 686; 8Ø L.Ed.2d, at 692.

Defendant argues that the standards set forth in Strickland have been met. Points one and two of Appellant's Brief meet the Strickland test. When combined with the other three points, it is apparent that Defendant was not represented competently, and that there is at least reasonable probability that, but for prior counsel's efforts, the result of the proceeding would have been different.

The balance of Defendant's brief will briefly address several issues raised in the Respondent's Brief.

ISSUES/ARGUMENT

Issue One

FAILURE TO MAKE CLAIM AGAINST "CO-COUNSEL", LeROY JOHNSON.

Defendant was granted his Pre-Trial Motion to hire Ginger Fletcher by the Trial Court after determination was made that there may have been a conflict of interest with the Weber County Public Defender attorneys. Ms. Flether was hired by the County to represent Defendant at Defendant's request.

Defendant had no knowledge or input into the hiring of LeRoy Johnson, and felt throughout the proceeding that Mr. Johnson was simply an assistant to Ms. Fletcher. At no time did

he consider LeRoy Johnson to be his attorney. Ms. Fletcher hired Mr. Johnson at Johnson's request to gain experience as an attorney by assisting Fletcher in the case.

Issue Two

DEFENDANT'S COMPETENCY/MENTAL CONDITION.

The State, for the most part, takes great license in interpreting the testimony of Dr. Alma Carlisle. Defendant urges the Court to review the record citations contained in State's brief, pages 8 and 9, and compare Dr. Carlisle's actual statements with the State's interpretations contained in the State's brief.

Defendant contends that though there is certainly room for interpretation, a jury would have been at least concerned and at most persuaded that Defendant's mental capacity was lacking below the level necessary for conviction of a capital offense. Dr. Carlisle testified that:

> "...being a multiple is different from being a whole person. And the whole person may decide to commit a certain crime and his thought process may be very consistent all the way through, from the beginning to the end. Thus, there seems to be more responsibility for that individual than for a multiple, who is, to a degree, out of control." (R., 2718.)

The State has also attempted to gloss over the fact that there was no expert testimony received at either of Defendant's trials in this matter. As the State suggests, many witnesses testified at his first trial regarding his changing personality and extensive history of mental health treatment.

(See Appellant's Brief, pp. 32-34). However, the State further erroneously suggests that because such testimony failed in the first trial, it was reasonable strategy not to raise the issue of Defendant's mental health at the second trial. The State forgets that in Defendant's first trial there was no expert testimony elicited regarding Defendant's diagnosed mental illnesses due to the fact that no such diagnoses were made until he was incarcerated in the Utah State Prison after a guilty verdict from the first trial.

Because prior defense counsel Fletcher had the benefit of the knowledge of the diagnoses and could have pursued the effect of Defendant's mental illness on his actions, as was testified to by Dr. Carlisle, her failure to raise such a crucial issue at trial is simply more evidence of the unreasonable and incompetent manner in which Defendant's defense was conducted.

Issue Three

CHAIN OF CUSTODY OF GUN.

State suggests that the chain of custody of the gun was not an element of the crime. Defendant concedes this point, but argues that the issue of how the gun got into the basement the night Kim Chapman was shot is a crucial issue. If the Defendant carried the gun in with him, it is more likely that his convictions are just; however, if he did not carry the gun in with him, then one or more of the elements of the crime necessary for a capital conviction are lacking.

The State argues that the Defendant`s actions of purchasing a gun and practicing shooting prior to the occurrences leading to the shooting of Kim Chapman, is evidence of his preparation for committing of a crime. The State fails to further explain that the gun purchased by Defendant from Roger Birt and which was used in the shooting practice (R., 2484-2488) was not the gun which fired the bullets which killed Kim Chapman. (See Appellant`s Brief, Addendum Exhibit 2, page 2 and R., 2881-2886.) According to investigator Vic Gabrenas` report, a .38 caliber, RG 31 handgun was found in the hills by Defendant`s attorney on directions from the Defendant, with the serial number ground off. After restoration of the serial number by the Weber State College Crime Lab Director, James Gaskill, the serial number was determined to be Q184020. This gun was tested and determined not to be the weapon which killed Kim Chapman. The weapon used in the shooting of Chapman had been determined to be an RG 40 model .38 caliber handgun, which was also re-tested at the time the RG 31 was tested by Mr. Gaskill, whose original conclusion was reaffirmed; i.e., that the RG 40 was the weapon used in the Chapman shooting. (See page 2 of Exhibit 2.)

The gun which was described as Exhibit 20 throughout Defendant`s first trial was obtained from a pawn shop known as The Gift Shop by Detective Norman Soakai (R., 824-5; see also Appellant`s Brief, Addendum Exhibit 6, which is a pawn slip used to obtain Exhibit 20; see also Appellant`s Brief, Addendum

Exhibit 7, which is an Affidavit for Search Warrant describing Exhibit 2Ø as an RG .38 special handgun, model 4Ø, serial number P139Ø58).

Mr. Gaskill testified in the Defendant's first trial that Exhibit 2Ø was the weapon which fired the bullets which killed Kim Chapman (R., 748-75Ø).

The State would have the Court believe that the Defendant purchased a gun with the intent of killing Mr. Chapman, but because there was more than one gun involved in testimony given at the Defendant's trial, the issue of which gun was used and where it came from is clearly important in determining criminal liability, if any, against the Defendant. Defendant's prior counsel ignored these important facts and allowed the State to gloss over the dilemma the gun issue would have caused to the jury.

As Defendant has asserted throughout, the gun which shot Kim Chapman was not brought to the basement of the Chapman residence by the Defendant, but rather was already there when he arrived. Defendant argues that Beverly Jones, the State's main witness and who was also wounded in the incident, actually brought the gun to the basement, and that after the shooting, though wounded, was able to hide the gun until it could be retrieved and transported back to its owner. (See Appellant's Brief, pages 43 and 44.)

The State, in its brief, suggests: "...it is unlikely

Beverly could have retrieved and hidden the gun." (See Respondent`s Brief, p. 11). Apparently, the State is misled in its belief that once the Defendant left the basement of the Chapman residence, Earl Chapman, his wife, and the police subsequently appeared immediately, thus not allowing time for Ms. Jones to hide the weapon. However, as Earl Chapman testified in the Defendant`s first trial, he walked downstairs, and after an initial brief view of the situation, he went back upstairs and telephoned the police. In doing so, he initially called the fire department and was told to call the police. He then dialed the number given to him by the fire department and was asked "to hold on for a minute." After making the call, he went to the front door and turned on the porch light, where there was an officer waiting. (R., 598-600.) It is unknown exactly how much time elapsed from the time Mr. Chapman initially viewed the scene in the basement after the shooting occurred until the time when he and the police officer re-entered the basement. However, several minutes would have had to have elapsed for him to have called the fire department and then the police department, and then allow the police officer into the home and proceed to the basement Such lapse of time would have given Beverly, who was still mobile, though wounded (R., 990 and 991), ample time to retrieve the weapon and hide it in a manner that it was not discovered. Then, at an early opportunity to enlist the help of an accomplice to retrieve the weapon and return it to the gun`s owner(s). (See

further, Appellant`s Brief, pp. 18-22 and 41-45.)

SUMMARY

Defendant has met his burden to show that his second trial did not produce a just result. There are still too many loose ends and too much evidence that a trier of fact has not had opportunity to review for one to believe that Defendant`s trial was fair and reliable. A jury with all the facts before it would not have been able to convict Defendant in the way he was convicted. The arguments raised by Defendant do create reasonable doubt as to the level of crime, if any, that Defendant committed. Failing to raise the issues of Defendant`s mental illness and the ownership/custody of the gun alone is enough to demonstrate Attorney Fletcher`s deficient performance. Certainly, failure to present such evidence, when it exists, is prejudice. These points, combined with the others raised in Appellant`s Brief, resulted in a trial result which is unreliable. Strickland, 466 U.S. 687.

CONCLUSION

Based on the arguments contained in Appellant`s Brief and the Reply herein to the State`s claims, Defendant respectfully requests this Court to reverse Defendant`s conviction and order a new trial.

RESPECTFULLY SUBMITTED this 2nd day of November, 199Ø.

Robert L. Froerer
ROBERT L. FROERER
Attorney for Defendant/
Appellant

CERTIFICATE OF MAILING

I hereby certify that on the 2nd day of November, 199Ø, I mailed, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to Sandra L. Sjogren, Assistant Attorney General, Attorney for Plaintiff/Respondent, at 236 State Capitol, Salt Lake City, UT 84114.

Robert L. Froerer
Robert L. Froerer