1982

State of Utah v. Hoyt Glenny : Brief of Respondent

Utah Supreme Court

Stephen Mark Stephens; Attorney for Appellant;
David L. Wilkinson; Earl Dorius; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18143
HOYT GLENNY,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a jury verdict of guilty of forcible sodomy in the Fifth Judicial District Court in and for Iron County, the Honorable Louis G. Tervort, and the Honorable Robert F. Owens, Judges, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by information with forcible sodomy in violation of Utah Code Ann., § 76-5-403 (1953), as amended.

DISPOSITION IN THE LOWER COURT

In a trial before a jury presided over by the Honorable Louis G. Tervort and the Honorable Robert F. Owens, conducted on October 28 and 29, 1981, in the Fifth Judicial District Court in and for Iron County, Utah, appellant was found guilty of forcible sodomy. Accordingly, on December 11, 1981, appellant was sentenced to a term of not less than five (5) years nor more than his natural life.

RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order of this Court affirming the jury verdict and sentence of the lower court.

STATEMENT OF THE FACTS

On July 3, 1981, in Cedar City, Iron County, Utah, John Thorpe Cooper, thirteen years old, was collecting aluminum cans for the purpose of taking the cans to the Safeway supermarket for recycling. Cooper's rounds took him by the American Motel in Cedar City and to Room 17 where appellant, Hoyt Glenny, was residing at the time (T. 49). Prior to this date, Cooper had met appellant on another occasion when Cooper was around the motel searching for cans (T. 49). At that time, appellant told Cooper that he had some cans and invited Cooper to stop by his room when he was in the area again (T. 49). Consequently, when Cooper returned to the American Motel on July 3, he went to Room 17 and was invited by appellant to enter his room (T. 49). A discussion ensued concerning Cooper's can collecting with appellant informing Cooper that the boy could have a six pack of beer which was in the refrigerator. Cooper removed the six pack from the refrigerator, drank a single can of beer and kept those remaining (T. 52). Appellant then asked Cooper if he would run an errand for him to the Court Hotel where supposedly appellant had some clothes (T. 53, 78). Cooper proceeded to the hotel on his bicycle but returned shortly to appellant's room following his perfunctory visit to the Lunt Hotel (T. 53). Despite the fact that Cooper was unable to obtain appellant's clothes, appellant, after shutting the door behind

Cooper, gave him five dollars (T. 54). Appellant next asked Cooper to sit on his lap (T. 55, 67, 79). Then appellant kissed Cooper's lips and began rubbing Cooper's penis through his long pants and underwear (T. 55, 56). Appellant continued his fondling of the boy by unzipping Cooper's pants and slipping off his undershorts (T. 56). Appellant then invited Cooper to join him on his bed where he continued to rub the boy's penis (T. 57). Once on the bed, appellant put his mouth momentarily on Cooper's penis (T. 56, 57, 62, 68). Cooper struggled to get away from appellant but appellant attempted to forcibly restrain him by pressing on Cooper's chest (T. 58). Freeing himself from appellant's force, Cooper put on his pants and bicycled home (T. 58).

Appellant's testimony differs from Cooper's in certain respects as to what occurred following the boy's return from the Lunt Hotel. Appellant testified that when Cooper returned from running the errand to the Lunt Hotel, appellant gave him not five dollars, but two (T. 79, 87). Appellant claimed that although he was fairly intoxicated when Cooper sat on his lap he could not remember rubbing his hand back and forth over Cooper's upper thigh after placing it there (T. 80). Appellant testified that he did remember kissing Cooper on his forehead and not on the lips, as Cooper had testified (T. 80). Appellant stated that his lips did not touch any other part of Cooper's body (T. 88). Appellant

further claimed that he did not move from the chair to his bed because of emphysema "compounded by drinking" which made walking and drinking difficult (T. 80, 81). Appellant testified that he never unzipped Cooper's pants, removed Cooper's underwear or touched Cooper's genitals (T. 81, 82).

Following consideration of the evidence, the jury found appellant guilty of forcible sodomy (T. 101).

ARGUMENT

POINT I

UNDER UTAH'S STATUTE, PENETRATION IS NOT AN ELEMENT IN THE CRIME OF FORCIBLE SODOMY.

Appellant was convicted of forcible sodomy consistent with that crime's definition as set forth in Utah Code Ann., § 76-5-403 (1953), as amended:

> (1) A person commits sodomy when he engages in any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.
> (2) A person commits forcible sodomy when he commits sodomy upon another without the other's consent.
> (3) Sodomy is a class B misdemeanor. Forcible sodomy is a felony of the second degree unless the victim is under the age of 14, in which case the offense is punishable as a felony of the first degree (Emphasis added).

In his brief, appellant admits that his mouth "was on the penis of John Cooper, or to the penis of John Cooper, or that there was contact between the [appellant's] mouth and John Cooper, . . ." (Appellant's brief at 6). The appellant, however, argues that notwithstanding these actions, he cannot be guilty of forcible sodomy since there was no evidence at trial concerning any penetration or insertion of appellant's penis into the victim's mouth. By citing a plethora of cases, appellant attempts to resurrect penetration as an essential element to be proven in any sodomy prosecution. Appellant directs this Court's attention to State v. Peterson, 81 Utah 340, 17 P.2d 925 (1933) in which the Court merely acknowledged the parties' stipulation concerning the insertion of the defendant's sexual organ into the mouth of the victim. 17 P.2d at 926. However, in the case at bar we are neither tied to a stipulation nor is one required in order to sustain a conviction in light of more recent statutory enactments.

On its face, this state's sodomy statute does not require penetration. In Utah, a person is guilty of the crime of sodomy simply by engaging "in any sexual act involving the genitals of one person and the mouth or anus of another . . ." Utah Code Ann., § 76-5-403(1) (1953), as amended. Here, we have appellant admitting to such involvement between his mouth and John Cooper's penis, as well as the testimony of John Cooper. Contact or touching is the crucial element in this

state's sodomy definition and not penetration. It is established that "any touching" is sufficient. Utah Code Ann., § 76-5-407 (1981 Supp.), as amended, states in pertinent part:

> (2) In any prosecution for unlawful sexual intercourse, rape or sodomy, any sexual penetration or, in the case of sodomy, any touching, however slight, is sufficient to constitute the offense (Emphasis added).

Appellant not only wrongly insists on penetration as an element, but also argues that the Court should rely on the common law to help it out of a definitional quagmire. This Court explicitly stated in State v. Maestas, No. 17751 (decided July 21, 1982) that "common law definitions of criminal behavior have no application in this jurisdiction." Id. at p. 2. The penal code adopted by this state clearly abolished all common law crimes. See Utah Code Ann., § 76-1-105 (1953), as amended. Thus, it is unquestionable that appellant's conduct constituted the crime of forcible sodomy in that appellant's mouth did touch the penis of a thirteen-year-old boy, and no alliance to antiquated cases and statutes can rescue appellant from the clarity of statutory realities.

POINT II

THE TRIAL COURT DID NOT ERR IN NOT REQUIRING TRANSCRIPTION OF CLOSING ARGUMENTS.

Appellant alleges that the trial court erred when it did not require the recording of the closing arguments of

counsel. In State v. Gray, Utah, 601 P.2d 918 (1979), this Court addressed the same issue when defendant argued that his constitutional right to appeal had been deprived since closing arguments were not transcribed. 601 P.2d at 920. The Court explained that "it is not customary in our Courts, nor in most courts, for the reporter to take down the arguments of counsel, unless and to the extent directed by the trial judge." Id. at 920-921. The trial judge's prerogative of transcription is more than custom, it is statutorily warranted. Utah Code Ann., § 78-56-2 (1953), as amended, provides:

> It shall be the duty of the shorthand reporter to attend all sessions of the court, and to take full stenographic notes of the evidence given and of all proceedings had therein, except when the judge dispenses with his services in a particular cause or with respect to a portion of the proceedings thereof . . . (Emphasis added).

Appellant praises the value of judicial records and respondent joins in that observation, but when the trial judge has determined that no transcription of closing argument is necessary, this decision "deprives no one of any essential right." Gray at 921. Absence of the written record does not leave future defendants, like appellant, in an environment of predictable injustice and unfairness. As this Court observed in Gray:

> The trial judge, the defendant, and counsel for both sides are all required to be present. They are presumably paying close attention to what is said in the arguments; and each has unfettered opportunity to interrupt at any time and request that any portion of an argument be recorded, and to voice any objection thereto he may desire.

Id. at 921. Due to the omnipresence of these stabilizing factors, the court in Gray warned against "mere shot-gun" attacks against the non-recording of closing arguments. Id. at 921.

Appellant, in the case at bar, points to no specific impropriety committed by the prosecution or the trial judge during the course of closing arguments but instead chooses to generally protest the lack of reporting.

Assuming, arguendo, that the trial court did err in not having closing arguments recorded, it is incumbent upon appellant to specifically demonstrate prejudicial error for there to be a reversal. The Fifth Circuit, in Addison v. United States, 317 F.2d 808 (5th Cir. 1963), cert. denied, 376 U.S. 905, 84 S.Ct. 658, 11 L.Ed.2d 605, stay denied, 376 U.S. 936, 84 S.Ct. 791, 11 L.Ed.2d 657, reh. denied, 376 U.S. 966, 84 S.Ct. 1121, 11 L.Ed.2d 984, said:

> . . ., the record is silent as to any objection made or any motion of any kind filed with respect to any alleged impropriety during the course of the final

> arguments of counsel. Nor have the appellants in their original brief filed in this case attempted to state that any inflammatory or improper comments were made during their summations. Obviously, even though a failure of the court reporter to report the arguments of counsel were an error per se, such error would not be available to appellants to work a reversal without a showing that it was prejudicial error.

Id. at 811. Here, as in Addison, appellant asks this Court "to indulge a presumption of prejudicial error without any basis," except in the nebulous allegation that the trial judge was negligent in not mandating the court reporter's presence. State v. Wright, 97 Idaho 229, 542 P.2d 63, 67 (1975). Such imprecise objections are insufficient however in presuming fundamental and reversible error from a silent record. See Fowler v. United States, 310 F.2d 66 (5th Cir. 1962). Moreover, since the record is silent, this Court is reluctant "to reverse a conviction on matters dehors the record." State v. Starlight Club, Utah, 406 P.2d 912, 913 (1965). In State v. Newmeyer, No. 17512 (decided August 19, 1981), the appellant argued that the prosecutor's argument before the jury regarding the plight of the victim constituted reversible error. This Court in Newmeyer stated that in light of the fact that the particular remarks were not recorded "[W]e cannot ascribe prejudiciality on the second-hand recital by defense counsel of what he thought was said and which is not before us." Id. at 2. Thus, appellant's claim of error fails

either because of the statutory permissibility of not recording closing arguments, the non-specificity of his claim, or due to the intangible nature of his entire proposition.

POINT III

CONSISTENT WITH UTAH'S STATUTE, BY BECOMING VOLUNTARILY INTOXICATED APPELLANT VOLUNTARILY ABSENTED HIMSELF FROM JURY SELECTION.

The appellant next argues that his absence from the courtroom during the selection of the jury was not voluntary; therefore his constitutional right to be present during all the proceedings of his trial was violated requiring a reversal of his conviction. It cannot be argued that a defendant enjoys the "basic right" of being present in the courtroom at each stage of his trial and that his right to be present is "guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment." State v. Carver, 496 P.2d 676, 678 (Idaho 1972); See also: Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). That jury selection is considered an integral part of the trial itself "is a matter of settled law." Carver at 678. Both United States v. Crutcher, 405 F.2d 239 (2d Cir. 1968), cert. denied, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969) and Knight v. State, 273 Ala. 480, 142 So.2d 899

(Ala. 1962) dealt with the right of a defendant to be present during voir dire. Both courts linked defendant's right to be present with his ability to assist with his defense. As the court in Carver observed:

> The defendant may wish to challenge a particular prospective juror for any one of several valid reasons, or of which may be a negative visceral reaction. That is his long recognized privilege and one which is important to the trial process.

Carver at 679.

The United States Supreme Court's decision in Snyder v. Commonwealth of Mass., 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934) involving "defendant's right to be present" relates to the due process axioms: full and fair opportunity to be heard and to defend oneself. Snyder concerned the absence of defendant during a viewing of the scene of the crime by the jury. In the court's majority opinion, Justice Cardozo explained that the right to be present was violated:

> . . . whenever [defendants'] presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge . . . Again, defense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel, for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself.

Id. at 105-106 (Emphasis added).

In State v. Carver, 94 Idaho 677, 496 P.2d 676 (1972), the defendants were not in the courtroom at the beginning of voir dire and this was held to be constitutional error in light of the rationale that:

> . . . an accused's presence during voir dire examination would be important in determining which jurors may be acquainted in some way with defendant, and vice versa. Impartiality and objectivity would be aided by the defendant's presence.

Id. at 679 (Emphasis added). Here again we have a court recognizing the defendant's right to be present during an important stage of the trial yet couching it in terms of the due process expectation that defendant's attendance would be a possible asset in mounting and participating in his defense and not a distinct detriment.

This court has recognized this "right which belongs to every defendant" to be present but like other courts has acknowledged the right's reasonable qualifications. State v. Myers, 508 P.2d 41, 42 29 Utah 2d 254 (1973). In Myers, where the defendant absconded intentionally from the jurisdiction, the trial proceeded without him "since [i]t is a right which may be waived under certain circumstances." Id. at 42. Under Utah Code of Criminal Procedure, § 77-35-17 (1981 Supp.) such a waiver by the defendant is established. The pertinent sections provide:

> (a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:
> (1) . . .
> (2) In prosecutions for offenses not punishable by death the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; . . .
> (Emphasis added).

Appellant here asserts that he did not voluntarily absent himself from the trial proceedings when he became substantially intoxicated the morning of his trial. The transcript reveals that the prosecutor had learned of appellant's inebriated state "through communications with Mr. Thorley (trial counsel for appellant) and also through the Sheriff's Office in Cedar City, . . ." (T. 3). The prosecutor then explained to the trial judge that defendant's condition, if his presence were compelled during voir dire, "would certainly be detrimental to his own interests, as well as the interest of justice" (T. 3). Defendant's counsel responded that "while Mr. Glenny may have become intoxicated voluntarily, he has not voluntarily absented himself from this proceeding at this point in time" (T. 21). Counsel continued by arguing that although defendant's absence was a consequence of what he did voluntarily, ". . . he has not directly intended to do whatever has happened in this case" (T. 4).

Such an argument requires an amalgam of tortured logic to find that defendant's voluntary choice of becoming intoxicated can be considered separate and apart from the natural and foreseeable consequences of his conduct which demands no extraordinary prescience, just common sense. In short, appellant quite voluntarily and conveniently absented himself from the courtroom the morning of the trial via his quite voluntary act of imbibing. As this Court held in Myers, supra:

> In the administration of justice a court cannot be rendered helpless and impotent by the devious and cunning ways of defendants who might employ a host of subtly ingenious strategies to prevent the court from convening and proceeding.

Id. at 42. As the Myers court explained, "To hold to the contrary would permit a mischievously inclined defendant to profit by his own wrongdoing." Id. at 42-43.

It is only reasonable therefore to conclude that appellant in this case knew or at least should have known that his decision to begin drinking prior to his court appearance might result in his absence from the courtroom due to the court barring him from the proceeding because of the prejudicial dangers inherent in his presence. There is no statutory requirement, in this state at least, that the

waiver of the right to be present, i.e., the choice to be voluntarily absent, be explicitly articulated by the particular defendant; thus appellant's irresponsible behavior alone was sufficient for the trial court to find that defendant had indeed absented himself from voir dire--that absence being implicitly definite and undeniably voluntary.

POINT IV

THE VICTIM, A 13-YEAR-OLD, WAS COMPETENT TO TESTIFY PURSUANT TO UTAH LAW.

Under Utah law, only when a witness is under the age of ten years must there be judicial determination concerning the child's competency to testify. Utah Code Ann., § 78-24-2 (1953), as amended, provides in pertinent part:

> The following persons can be witnesses:
>
> (2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

The victim here, John Thorpe Cooper, was thirteen years old at the time of his testimony. The parties stipulated to his age (T.). Thus, under the law, the prosecuting witness, a 13-year-old, is not included within the application of the "under ten" requirement of Utah Code Ann., § 78-24-2 (1953), as amended, as appellant contends; but rather falls under the

broader terms of Utah Code Ann., § 78-24-1, providing in pertinent part:

> All persons, without exception, otherwise than as specified in this chapter, who, having organs of sense, can perceive, and, perceiving, can make known their perception to others, may be witnesses. . . .

However, as this court has long recognized, "not age, but mental capacity, is the test of competency." State v. Zeezich, Utah, 61 Utah 61, 210 P.2d 927, 928 (1922). See also: State v. Blythe, 20 Utah 379, 58 P. 1108 (1899); State v. Morasco, 42 Utah 5, 128 P. 571 (1912); State v. Macmillan, 46 Utah 19, 145 p. 833 (1915); State v. Dickson, 114 Utah 301, 199 P.2d 775 (1948); State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961); State v. Mills, Utah, 530 P.2d 1272 (1975). To be sure, age is a factor to consider in determining whether a child of tender years is competent to testify, but it is "not the sole criterion." Sanchez, 361 P.2d at 175. In Sanchez, the appellant argued that the ten-year-old prosecutrix was not competent as a witness since she experienced some difficulty in understanding some of the questions posed to her. This Court held, however, that although:

> her responses might be viewed by some as not entirely satisfactory, . . . it can fairly be said that they showed a knowledge that it was a good and proper thing to tell the truth and bad to lie.

Id. at 175. The Court then explained "Allowance must be made for the difference in capacities of individuals and no particular age or degree of mental ability can be set as a rigid standard." Id. This flexibility is possible:

> [b]ecause of the position of the judge in proximity to the trial and the witnesses he is in an advantaged position to pass on these matters, and the question whether a child is qualified to be a witness must be left largely to his judgment.

Id. In State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965), this Court held that what is essential in testing competency:

> . . . is that it appear that the child has sufficient intelligence and maturity that she is able to understand the questions put to her; that she has some knwoledge of the subject under inquiry and the facts involved therein; that she is able to remember what happened; and that she has a sense of moral duty to tell the truth.

401 P.2d, 445 at 447. In echoing the Sanchez holding, the Court in Smith said that the determination of these tests "is within the sound discretion of the trial court . . . His ruling will not be disturbed in the absence of a clear showing of abuse." Id. at 447.

In the case at bar, there was certainly enough evidence establishing John Thorpe Cooper's competency to testify. On direct examination, John was asked whether he understood the oath and the importance of his telling the

truth, to which he affirmatively responded (T. 48). Moreover, Cooper demonstrated knowledge regarding the time, place and events surrounding appellant's criminal conduct. He even could recall the layout of the hotel room where appellant was residing on the day of the crime (T. 50-51).

Thus, the trial court's allowing the 13-year-old victim to testify was not an abuse of discretion and the record is replete with indicia of competency demonstrating the soundness of the trial court's decision to hear the testimony of young Cooper.

POINT V

THE TRIAL COURT DID NOT ERR IN NOT GIVING INSTRUCTIONS ON PENETRATION OR THE VICTIM'S COMPETENCY TO TESTIFY.

Once again, appellant wrongly avers that penetration is an essential element in the crime of forcible sodomy, but in Utah no such instruction is relevant since common law definitions were abolished through adoption of the criminal code. As respondent points out above, contact or touching is the crucial element of sodomy and not penetration (See Point I, supra). The court therefore did not err in failing to instruct the jury as to the common law element of penetration.

As for appellant's contention that it was reversible error for the trial court not to give a cautionary instruction

to the jury regarding the testimony of a minor, respondent finds nothing in the transcript to show that one was requested and finds no statute mandating the giving of such an instruction every time a child of tender years testifies in a courtroom.

In Hendersen v. Kibbe, 97 S.Ct. 1730, 431 U.S. 407 (1977), Justice Stevens, writing for the Court, stated that:

> Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

Id. at 154 (Emphasis added). Similarly, this Court in State v. Kazda, Utah, 545 P.2d 191 (1976), held that one would be precluded from claiming error when he "fails to make a proper objection to an erroneous instruction, or to present to the court a proper request to supply any claimed deficiency in the instructions, . . ." Id. at 193. In so holding, this Court recognized "the fact that the defendant did not, either by submitting written requests, or by oral exceptions, point out the claimed error and the remedies for the defects he now claims existed in the instructions." Id. at 192. In like manner, defense counsel at appellant's trial made no objection

to the absence of the cautionary instruction at the time and thus should be barred from raising any protracted objection here. Admittedly, there is an exception to the timeliness rule of Kazda, but it is applied "only rarely where there appears to be a substantial likelihood that an injustice has resulted." Id. at 193.

In State v. International Amusements, 565 P.2d 1112 (1977), this Court amended the substantial likelihood of injustice exception of Kazda to apply only in instances where the failure to give certain instructions is so "palpable as obviously to reflect prejudice amounting to a denial of due process." Id. at 1113. No matter what the chosen terminology, the point remains that unless the defendant raises a timely objection to the court's failure in giving a certain instruction, the subsequent conviction of the defendant will not be reversed, except when a showing is made of substantial and palpable prejudice. See also Rule 19(c), Utah Rules of Criminal Procedure. The rarity of acknowledging this exceptio indicates the heavy burden that must be assumed and proven by a defendant in order for him to prevail on appeal.

Appellant's assignment of prejudice here goes no further than citing three cases: State v. Morasco, supra, State v. Zeezich, supra, and State v. Dixon, 199 P.2d 775 (1948), in which each victim was under ten years of age and the trial judges felt that the tender years of the victims

necessitated a cautionary instruction on the issue of their credibility. Here, the victim is a 13-year-old and outside the purview of Utah Code Ann., § 78-24-2 (1953), as amended. Being appreciably older than appellant's cited youthful parade of victims, John Thorpe Cooper and his testimony are not subject to the same concerns that a trial judge might have with respect to that of a younger witness. Put simply, no such instruction was requested, and even though the trial judge opted not to give one, that choice is entirely within his discretion since one is not required. As this Court in State v. Smith, supra, noted,

> After the trial court is satisfied with the competency of the witness, the final judgment as to the credibility and the weight to be given her testimony is for the jury.

Id. at 447. The jury's verdict is evidence of its confidence in Cooper's credibility, and appellant's tardy objection without more cannot overturn that unanimous belief in appellant's guilt.

POINT VI

APPELLANT WAS NOT DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL.

Lastly, we are facecd with appellant's argument, frequently proffered by others like him, that he was deprived

of his constitutional right to effective counsel and as a result his conviction should be reversed or at least remanded in order that a new trial be commenced. Appellant sets forth a myriad of claims which together amount to no more than a spectrum of speculation and a futile attempt to second-guess the strategy of his trial counsel.

Ever since the United States Supreme Court interpreted the Sixth Amendment to include the right to effective assistance of counsel in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), there has been debate over what standard of performance is demanded by that constitutional guarantee. Most of the circuits, either implicitly or explicitly, have abandoned the "sham and mockery" test first enunciated in Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945) and have replaced it with the higher standard of "reasonably competent assistance" of counsel. See Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980) for evolution of the standard. In adopting this new test, the Tenth Circuit in Dyer stated that the "Sixth Amendment demands that defense counsel exercise the skill, judgment and diligence of a reasonably competent defense attorney." Id. at 278. Recently, this Court stated that the four-pronged test coming out of the Dyer standard requiring that defendant:

(1) establish proof of the ineffectiveness of counsel, (2) show that the ineffectiveness was due to the inadequacy of

counsel and not as a result of trial strategy, (3) demonstrate that better representation might have had some effect upon the result of the trial, and (4) prove that motions and objections which were not made would not have been futile if raised, does have its parallels in Utah. State v. Malmrose, Utah, No. 17661 (decided June 22, 1982).

In State v. McNicol, Utah, 554 P.2d 203 (1976) this Court held that the Sixth Amendment right to effective counsel specifically entitles defendants to:

> . . . the assistance of a competent member of the Bar, who shows a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the profession.

554 P.2d 203, 204. The McNicol court also stated that:

> . . . A defendant bears the burden of establishing the inadequacy or ineffectiveness of counsel, and proof of such must be a demonstrable reality and not a speculative matter.

Id. at 203, 204 (Emphasis added). Respondent believes that appellant's argument of ineffective representation has no basis in reality and thus is relegated to delusional hindsight.

It is quite clear that the Sixth Amendment guarantee does not interfere with an attorney's "legitimate exercise of judgment, as to trial tactics or strategy." Id. at 205. In

State v. Wood, Utah, No. 16486, (decided May 13, 1982), we are reminded again that:

> Trial tactics lie within the prerogative of counsel and may not be dictated by his client. Decisions as to what witnesses to call, what objections to make, and, by and large, what defenses to interpose, are generally left to the professional judgment of counsel.

Id. at p. 28 of Wood opinion. See also: State v. Gray, Utah, 601 P.2d 918 (1979); State v. Pierren, Utah, 583 P.2d 69 (1978); State v. McNicol, Utah, 554 P.2d 203 (1976). It is this reminder that appellant has either forgotten or ignored in his desperation to find a conviction tainted by reversible error.

Appellant's contention that trial counsel should have moved for a change of venue into a supposed "liquor liberated" forum such as Salt Lake County lacks any empirical foundation. Trial counsel probably concluded that the choice of venue to remain in Iron County would certainly not harm appellant's chances of acquittal since some of the jurors might be acquainted with appellant. The decision to remain in Iron County was reasonable with nothing being revealed during voir dire examination to the effect that appellant was not being tried before a fair and impartial jury.

By the same token, appellant's claim that trial counsel should have asked the prospective veniremen whether

they possessed any bias toward "imbibers" falls under the strategic prerogatives alotted defense counsel under McNicol and its progeny. It is quite reasonable to conclude that defense counsel wanted to de-emphasize appellant's penchant for alcohol and believed that a specific question during voir dire might only increase the grade of defendant's already formidable evidentiary incline.

In considering the validity of appellant's next claim of counsel's inefficacy, the Court need only turn to the trial transcript to discover that trial counsel (who is also an officer of the court) acted reasonably in notifying the court (to the exclusion of the jury) of the reason for his client's absence and that he impliedly did move for a continuance when he argued that appellant had not voluntarily absented himself from the proceedings when he became voluntarily intoxicated and he "would desire his presence during the choosing of the jury" (T. 4). Despite this argument, the trial judge found that appellant had voluntarily absented himself from voir dire (T. 4, 5).

Finally, appellant complains that an expert witness was needed to persuade the jury that alcoholics have a diminished sex drive. Once again, appellant asks this Court to invade the realm of trial strategy which it has never done. Such an Orwellian intrusion into defense counsel's tactical decisions would strip the legal profession of its independence

and integrity. Appellant has offered nothing to show that if such an expert did testify, the result of the trial would have been different. Indeed, such testimony would have been only marginally helpful given the victim's testimony in this case. Again, the decision as to what witnesses to call is within the province of defense counsel. Appellant makes other claims, but we need not consider them here since an affidavit which was attached as an addendum to appellant's brief and which was subsequently stricken by stipulation from appellant's brief formed the basis of those otherwise groundless claims.

When juxtaposed to the de minimus standard of "reasonable competence" reaffirmed in Malmrose, respondent submits that appellant's claims of ineffective legal counsel fail because of their speculative nature or because his claims involve trial strategy. Respondent appreciates the frustrations of Justice Crockett when he observed in State v. Harris, 30 Utah 2d 354, 517 P.2d 1313 (1974):

> In regard to the defendant's contention that he was denied effective counsel: we are impelled to remark that it is nothing less than shameful that our law seems to have degenerated to a point where whenever an accused is convicted of crime, the charge of incompetency of counsel is, with ever increasing frequency, leveled at capable attorneys who have given entirely adequate service when the real difficulty was that he had a guilty client. In this respect also defendant had his entitlement of adequate representation by capable and conscientious counsel.

517 P.2d at 1315. Here, we too have the cry of foul in the guise of indiscriminate claims of inadequacy, and those facts cannot erase the salient realities of a guilty appellant and competent defense counsel.

CONCLUSION

Appellant alleges error on several points to obtain a reversal of his conviction and sentence. Respondent has shown the weakness or illogic which attaches to each of appellant's allegations by relying on clear statutory language, recent case law, or the trial transcript. For all of the above reasons, respondent respectfully urges this Court to affirm appellant's conviction and sentence.

Respectfully submitted this 1st day of October, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Stephen Mark Stephens, Attorney for Appellant, 777 East Williams Street, Suite 202, Carson City, Nevada, 89701, this 1st day of October, 1982.

Susan Patton