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Walter Lee Chamblee v. John Stocks and Ray Tibbetts : Brief of Respondents

Utah Supreme Court

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JUN 14 1959

CLERK

IN THE SUPREME COURT OF THE STATE OF UTAH

WALTER LEE CHAMBLEE,
by and through his
guardian ad Litem,
Gertrude Elkins,
Plaintiff and Appellant,

FILED

JUN 15 1959

Clerk, Supreme Court, Utah

Case

No. 8666

— vs. —

JOHN STOCKS and
RAY TIBBETTS,
Defendants and Respondents.

BRIEF OF RESPONDENTS

FRANDSEN AND KELLER

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No. 8666

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The statement of facts set forth in plaintiff's brief are stated from the plaintiff's standpoint entirely. The defendant's version of the facts and the testimony submitted by witnesses called by the defense show that the plaintiff was picked up for questioning by the Sheriff and Ray Tibbetts, Deputy Sheriff, on April 27, 1955, at the Pick Service Station at Moab at between 7:00

o'clock and 7:30 in the evening (Tr. 145, 247). Prior to this time the Sheriff and Deputy Tibbetts had been to Price to an F. B. I. School. They were through with the School at around 4:30 and left Price and came back to Moab in the Sheriff's car (Tr. 145, 245). They arrived in Moab just about dark. Prior to leaving Price Sheriff Stocks had received a telephone call from Sheriff Snyder of Vernal asking him to locate John Edwin Davis, who was also sometimes referred to in the testimony as Edwin John Davis (Tr. 145, 245). Sheriff Snyder instructed Sheriff Stocks to pick up Davis and place him in the Grand County jail and then call him collect when he had him in custody.

Both the Sheriff and Deputy Tibbetts talked to the plaintiff in the Sheriff's automobile for 10 or 15 minutes and asked him about a geiger counted that had been recently stolen and about passing marijuana cigarettes which the plaintiff denied (Tr. 146, 149, 150, 249, 250). Stocks and Tibbetts, then, without using any force or violence or threats in any manner, released the plaintiff from the car (Tr. 151, 250). They then went over to the Colorado River looking for John Edwin Davis for the Sheriff of Uintah County (Tr. 251). They drove up the River Road to Nigger Bill Canyon, turned around and came back to the bridge and drove up the other side of the River and located Davis on the North side of said River (Tr. 154, 253). Davis was picked up about 8:00 to 8:30 p.m. and was then taken to the Grand County jail in Moab where Sheriff Stocks placed a collect call to Sheriff Snyder at Vernal to inform him that he had Davis in

custody (Tr. 157, 254). They waited from 30 minutes to an hour to get this call through to Snyder but were unsuccessful in contacting him (Tr. 157, 254). Later on in the evening around midnight Police Officer Leach informed Sheriff Stocks that there was a call for him from Sheriff Snyder at Vernal (Tr. 106, 163, 210). Sheriff Stocks and Deputy Tibbetts returned to the office where the call was taken from Sheriff Snyder at Vernal, and the Uintah County Sheriff was advised that Davis had been taken into custody and arrangements were made for Davis to be held in Moab until the following day when Sheriff Snyder would come for him. After waiting 30 minutes to an hour for this telephone call to Sheriff Snyder, the Sheriff and Deputy Tibbetts then went to the downtown area of Moab on patrol duty (Tr. 158, 255). They talked to Reed Somerville in front of the 66 Club (Tr. 158, 263, 341). While talking to Reed Somerville a Theodore Gibson drove up the street with some loud pipes on his car. Tibbetts remarked that this was the hotrod that they had been trying to catch (Tr. 159, 264). Tibbetts and the Sheriff then left in the Sheriff's car and overtook Theodore Gibson in his hotrod and Tibbetts gave him a ticket for excessive noise (Tr. 160, 161, 264, 265, 266, 320).

Warren Kent Somerville, who is the son of Reed Somerville, was called as a witness and he testified that he was in the car with Theodore Gibson and that they were stopped by the Sheriff and Deputy and that Tibbetts gave Gibson a ticket for excessive noise (Tr. 320). Warren Kent Somerville testified that Gibson got this ticket

between 8 and 10:00 p.m. (Tr. 320). He further testified that thereafter they were driving up and down the streets in Moab and they saw the Sheriff and Tibbetts a couple of times again that evening before midnight (Tr. 321, 324). At the time Gibson was given a ticket the Sheriff removed a half case of beer from the car (Tr. 160, 265, 319). Reed Somerville was the probation officer and the testimony shows that Warren Kent Somerville, the son, and Reed, the father, had a very firm discussion about this beer being in the car, which makes this occasion of being stopped by the Sheriff and Deputy very vivid in the memory of Warren Kent Somerville (Tr. 320, 339).

Bert Dalton, Justice of the Peace, was called as a witness and he testified that on April 29, Deputy Tibbetts appeared before him and made complaint against Theodore Gibson for committing the crime of excessive noise on April 27, 1955. A photostat of the Justice of the Peace's Docket was received in evidence as Exhibit 9 (Tr. 331).

Kay Young was called as a witness. He testified that he was in the downtown area of Moab on April 27 in the evening, that he saw the Sheriff's car twice, once at the Standard Oil Bulk Plant, and the second time on Main Street. That he saw them there after 8:00 p.m. (Tr. 225, 226).

Danny Bittle testified that on April 27 he went to the show at Moab and was downtown around 9:00 to 9:30 in the evening, that he saw the Sheriff and Deputy Tibbetts at the intersection of Fern's Cafe on Main Street,

that he talked to them at around 10:00 to 10:30 p.m. and he saw them again at the Arches Cafe after 11:00 p.m. (Tr. 232, 233).

In the contrast to this the plaintiff, Walter Lee Chamblee, testified that he was taken into custody by Sheriff Stocks and Deputy Tibbetts between 7:00 and 7:30 that evening (Tr. 67), that they took him over to some butane tanks where he claimed that they beat him up; that around 8:20 to 8:30 they took him up the Colorado River to Nigger Bill Canyon (Tr. 78), that they were with him continuously until 5 or 10 minutes after 12 o'clock midnight (Tr. 79), and that he was with them continuously between 4½ and 5 hours that evening from about 7:00 p.m. until about 12:10 a.m. (Tr. 79).

Chamblee also testified that after the Sheriff and Deputy left him at 5 or 10 minutes after midnight in Nigger Bill Canyon, after he had been hit and beaten, that he was unable to walk, that he crawled about 75 feet down to the creek, and that as he went down the River Road he would walk and run and crawl (Tr. 28, 82, 83); that he crawled on his hands and knees 4 or 5 times. He further testified that the waist overalls he had on while he was doing all this crawling were the same ones that were introduced as evidence in Court (Tr. 22, 83), which clothing was made available for examination by the jury to determine whether, in their opinion, Chamblee did crawl through the creek bed and down the River Road as he had testified.

There was a direct conflict in much of the evidence

and the jury was called upon to determine who was telling the truth. The jury heard evidence from the Sheriff and his Deputy and several witnesses called by the defense that the Sheriff and Deputy were in the downtown Moab area performing their duties as officers during the time that Chamblee claimed they had him in Nigger Bill Canyon hitting and abusing him. The jury, after hearing the evidence, apparently believed the testimony of the defense witnesses and returned a verdict of no cause of action.

Doctor Winston S. Ekren attended Chamblee at the Moab hospital. He stated that in his examination he saw some red marks on Chamblee's chest and back (Tr. 38, 53), but did not recall seeing any marks on his face (Tr. 40, 54). He further stated that he noticed no bleeding at the mouth or the nose (Tr. 49), and observed no loose hair or bald spots where the hair had been pulled out as claimed by Chamblee (Tr. 54). There were no bruises or marks observed by the doctor on his legs or in the groin area (Tr. 55). The doctor stated his opinion that Chamblee was complaining more than was justified from his examination (Tr. 55). X-ray was made of the chest area which revealed no bone injury (Tr. 56). The bruise marks on the chest were described by the doctor as being mildly red, and that they never did change color into black and blue marks (Tr. 54); he further stated that he did not observe any cuts or lacerations on Chamblee (Tr. 53). The doctor's physical examination of Chamblee did not bear out the claim of plaintiff that he had been hit and beaten to the extent and in the manner that he testified.

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CHANGE OF VENUE.

Plaintiff claims as Point No. 1 that “the trial Court abused its discretion in refusing to grant a change of venue on plaintiff’s motion.” The record shows that on May 25, 1956, plaintiff filed a motion for change of place of trial, and in support thereof, attached the following Affidavit of Robert W. Hughes, attorney for plaintiff:

Comes now Robert W. Hughes, attorney for plaintiff, in the above entitled cause, who first being duly sworn upon his oath deposes and says:

That he is well acquainted with the defendant, John Stocks, in the above entitled matter, and he is well acquainted with many of the residents in Moab City and Grand County; that said John Stocks is an elected public official of Grand County, to wit: Sheriff; that said John Stocks is a member of one of the oldest families in Moab and Grand County; that his relatives are numerous and his relatives, acquaintances and friends are innumerable in Grand County. Therefore, it would be almost impossible to procure an impartial jury for the trial of this matter and that deponent believes that an impartial trial cannot be had in the afore-said County designated in plaintiff’s Complaint, and that the place of trial for this action should be transferred to Carbon County, Price, Utah, wherein the relatives and friends of said John Stocks are not so numerable.

Dated this 23rd day of May, 1956.

The hearing on said motion was held on June 18, 1956, and the proceedings thereof are reported in the trial transcript of testimony commencing at page 356. Discussion was had as to possible difficulty in getting a jury (Tr. 359), whereupon the Court denied the motion and stated "If we can't get a jury, then we will consider whether we should move the trial for another place of trial or not" (Tr. 361). The motion for change of place of trial was again renewed by plaintiff in chambers on the day the trial began following the choosing of a panel of 14 prospective jurors. The hearing on said motion is reported commencing at page 6 of the transcript of testimony. The grounds presented were that the prospective jurors all knew and were acquainted with the defendants (Tr. 6), that all of the prospective jurors had heard about the case (Tr. 8), and that the case involved public officials (Tr. 9). After discussion, the Court stated that it was impressed that remarkable success had been had in getting 14 open-minded men and women as jurors (Tr. 10), and denied the motion.

The plaintiff claims reversible error on the ground that the Court abused its discretion in denying his motion for change of venue. Section 78-13-9 U.C.A., 1953, specifies the grounds upon which the Court may change the place of trial. It is noted that the language used in said statute is discretionary. It reads as follows:

"The Court *may*, on motion, change the place of trial in the following cases:

* * *

(2) When there is reason to believe that an

impartial trial cannot be had in the county, city or precinct designated in the complaint.”
(Emphasis added)

In construing the meaning of said statute, the Utah Court, in *Anderson vs. Johnson*, 1 U. 2d 400, 268 P. 2d 427, at page 404, stated:

“Our statute is so worded that it necessarily is left to the option of the trial court in all cases involving prejudice of the people locally, to decide whether conditions are such that the requirement of justice would be best subserved by a change.

“There would seem to be no room for contest where the statute makes the allowance of a change discretionary with the court.

“A trial court’s ruling on such a matter will not be considered to have been an abuse of discretion unless the court acted unfairly or by whim or caprice or practically denied justice in the case.”

The question of local bias is largely one of fact and is, therefore, peculiarly within the province of the trial judge. The record in the instant case clearly shows that the court gave due consideration to the grounds raised by the plaintiff. In ruling upon the original motion the Court recognized that the controlling factor in determining whether a change in the place of trial should be made would be the ability or inability to obtain an impartial jury at the time of trial (Tr. 361). The Court joined in the interrogation of the prospective jurors as to their acquaintance with the defendants, whether or not their acquaintance with the defendants would influence them one way or another in rendering a fair and

impartial verdict based upon the evidence and the law in the case, whether they had heard about the case, or discussed the case with the defendants, and if they had formed any opinion concerning the merits of the case from what they had heard (Tr. 3, 45). Jurymen Ellis testified, as stated in plaintiff's brief, that it might embarrass him to render a judgment against the Sheriff, but in answer to further questioning by the Court, he stated that he would be willing to follow the direction of the Court and decided the case on the evidence irrespective of his long acquaintance with the Sheriff (Tr. 4). Having had opportunity to observe the jurors first hand, the Court concluded that the claim of the plaintiff that a fair and impartial trial could not be had was unfounded, as witness his statement "Well it seems we have had remarkable success in getting 14 men and women there that are as open-minded as they are in this type of a case in this vicinity" (Tr. 10). On the basis of the record it cannot be said that the Court, in denying plaintiff's motion, "acted unfairly or by whim or caprice, or practically denied justice in the case."

Traditionally, the law respects the right of a defendant to defend an action against himself within the County of his residence, unless other factors are of sufficient weight as to justify the place of trial to be moved. The fact that one litigant is widely known in the County of residence whereas another is relatively unknown assuredly is not such a circumstance as dictates a ruling that a fair and impartial trial cannot be had. That mere acquaintance or popularity is not sufficient

grounds to require a change of venue, see *Krehbiel v. Goering*, 293 P. 2d 255, a 1956 Kansas case, in which it was held that refusal to change the place of trial on defendant's allegation that plaintiff was a resident of the County and defendants non-residents, and plaintiff was personally acquainted with a large number of persons qualified to serve as jurors so that defendants could not have a fair and impartial trial, was not an abuse of discretion.

The California Court, in *J. I. Case Threshing Machine Company v. Copren Bros., et al.* 169 Pac. 443, was called upon to rule upon a similar question in a case having almost analogous facts to the case at bar. The affidavit in support for a motion for change of venue provided, *inter alia*, as follows:

“... that the said plaintiff is practically unacquainted in the said County; that the said defendants . . . were born and raised in the said county, and are well and favorably known throughout its entire length; that they lived there nearly, if not entirely, the whole of their lives, and are at this time, mature men; that the County is a sparsely settled County, and the acquaintanceship of the said defendants extends throughout its course and length; that one of the said defendants . . . has, for a number of years, occupied the position of county assessor of said County, and is of wide and consequential influence therein.”

It further appeared that the population of said county was approximately 5,000. Although a much stronger case for change was there made than in the instant case, the Court denied the motion for change of venue and at page 447 stated as follows:

“It is conceivable that a showing might be made of a prejudice against a plaintiff so widespread, intense and outspoken through the public press and otherwise as to warrant a conclusion that the plaintiff would not have a fair trial where the action was pending. But it must be conceded that, without making an attempt to secure an impartial jury, it would require something more than a showing that the defendants are well and favorably known throughout the entire length of the county, and that one of them is of wide and consequential influence therein because he had been entrusted with the office of county assessor.

The Court also stated at page 446:

“It is an unwarranted inference that an impartial jury cannot be called from the citizens of that county capable of impartially trying a case between a foreign corporation and residents therein simply because these persons are widely and favorably known in the county.”

In *Reyher, et al., v. Mayne*, 10 P. 2d, 1109, the Colorado Court, in 1932, was called upon to determine whether or not the trial Court had abused its discretion in denying a motion for change of venue made by the defendants in a civil case wherein plaintiff was Sheriff of the County in which suit was brought. The Court states at page 1110 as follows:

“The application for change of place of trial was based on the alleged bias of the people of the county of the venue of which plaintiff was Sheriff, making it impossible, so it was said, to secure an impartial jury. . . . We have repeatedly held that in the absence of abuse of discretion the trial

Court's determination of the question is controlling on review. . . . The application is novel only in that plaintiff was Sheriff of the County where the cause of action arose and where he was seeking judicial redress. Such fact, while necessarily challenging the Court's best consideration and solemn judgment, constituted only an element and does not authorize a change as a matter of right. Examination of the record indicates the Court sensed the gravity of the point and that in making determination there was no abuse of discretion."

Plaintiff emphasizes in his brief the contact which a sheriff has with persons called to serve as jurors. Plaintiff does not claim, however, any particular acts on the part of the defendants whereby plaintiff was prejudiced other than in the general allegation that the jurors were acquainted with the Sheriff. Nothing specific is claimed whereby defendants used their offices to the damage of plaintiff. It should be pointed out that the contact which a Sheriff has with those chosen to serve as jurors is ministerial only. In the absence of a shortage of jurors the Sheriff has nothing whatsoever to do with the determination of who is to be chosen to act in this capacity. It is submitted that presenting the persons drawn for jury duty with notice of their selection and attending the jury while in Court are not such contacts as necessarily endear the Sheriff to the hearts of those so called.

The cases relied upon by plaintiff in support of his claim that the Trial Court abused its discretion in denying the motion for change of venue are all distinguishable on their facts from the instant case. In *Hunter v. Beckley*, 129 W. Va. 302, 40 SW 2d 332, wherein the plain-

tiff was clerk of the circuit court—"by reason of the very close and intimate connection which a circuit clerk necessarily has in the selection of juries" (Pg. 336). In *Belden v. Thiel*, 211 Wis. 428, 248 NW 417, the trial Court denied a motion for change of venue in an action in which the circuit judge was the plaintiff and the case was tried before a jury, the members of which had served as jurors during the term of court at which the judge's case was tried. The appellate Court ordered a new trial and a change of venue because of the prestige of the office of a circuit judge and the additional fact that the case was tried by a jury who had been in attendance at the court of said judge as jurors during the entire term at which said case tried, and thereby had had a close association with the judge in the work of the court. *State ex rel., White Water Association of Primitive Baptists v. Hoelscher, Judge*, 208 Ind. 334, 196 NE 1, stands for the proposition that transfer should be ordered because of bias of the trial judge and not because of any apparent bias or prejudice in the community. The question to be decided in *Tucker v. Gorley*, 176 Miss. 708, 170 So. 230, cited in plaintiff's brief, was not whether there was sufficient evidence to justify the court granting a change of venue, but rather whether the court had power to change the place of trial at all under the particular statutes applicable in the State of Mississippi.

It is submitted that the denial by the Trial Court of plaintiff's motion for a change of venue in the instant case was not an abuse of discretion, and plaintiff's Point No. I is without merit.

II

THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A NEW TRIAL.

Plaintiff contends that “the Trial Court abused its discretion in refusing to grant plaintiff’s motion for new trial on the ground of surprise through variance in the deposition and testimony at the trial of the defendant, John Stocks.” The claim is based upon the fact that in his deposition Sheriff John Stocks in answer to several questions as to what he did and who he saw during the evening of April 27, 1955, replied that he did not know or he did not remember, whereas at the time of trial said defendant gave testimony, supported by other witnesses, as to his activities during the evening in question. It is contended that such testimony surprised the plaintiff and prevented plaintiff from having a fair trial and the Trial Court in denying plaintiff’s motion for a new trial on this ground thereby abused its discretion.

The position of the Utah Supreme Court is clear as to review by it of decisions of the trial court upon motions for a new trial. In *Moser v. Zion’s Co-Op Mercantile Inst.*, 197 P. 2d 136, the Court stated at page 139 as follows:

“It is a matter now too well settled to admit of any serious dispute . . . that the question of granting or denying a motion for a new trial is a matter largely within the discretion of the trial Court. . . . This Court cannot substitute its discretion for that of the trial Court. . . . We do not ordinarily interfere with rulings of the trial Court in either granting or denying a motion for new trial and unless

abuse of, or failure to exercise discretion on the part of the trial judge is quite clearly shown, the ruling of the trial judge will be sustained.”

The rule was further stated in a more recent case *Marshall v. Ogden Union Ry. and Depot Co.*, 221 P. 2d 868, as follows:

“The granting or denying of a motion for a new trial is within the sound discretion of the trial Court. When a trial Court grants a new trial we will not disturb its action unless it is manifestly apparent that the Court has abused its discretion. . . . The Court has a great latitude in determining whether or not to grant such a motion and regardless of whether or not it refuses or grants the motion this Court will not disturb its discretion if such decision has a reasonable basis.”

A comparison of the deposition of defendant John Stocks and his testimony at the trial does not show that said defendant stated at one time he would testify to a certain state of facts and then at the trial changed his statements and stated the facts to be different or to the contrary. While it is true that the Sheriff replied to several questions at the time his deposition was taken that he did not recall or did not remember, such is understandable when it is realized that the deposition was taken more than a year following the date upon which plaintiff claims the assault occurred. It is understandable that Sheriff Stocks would not have a detailed recollection of what transpired on a day that long ago. Sheriff Stocks did not know beforehand what questions he would be asked at the deposition. He had no particular reason or incentive to

undertake measures to refresh his memory as to what happened on said day prior to the time his deposition was taken. In answering that he did not know or did not recall, said defendant was simply telling the truth. Thereafter, however, faced with a claim against him which he knew to be false, the Sheriff very naturally did all things possible to bring to mind events which happened on the day in question. He checked the material at his disposal and talked to other people, all of which helped to refresh his memory and enabled him to testify as was done at the trial (Tr. 211-214).

A review of the entire deposition of the defendant, John Stocks, indicates a genuine effort on his part to answer to the best of his recollection and does not show his answers to be deliberately evasive as claimed by the plaintiff in the isolated examples as shown in plaintiff's brief. Any claimed variance in the things Sheriff Stocks stated in his deposition and in his testimony at the trial would go to the weight of his testimony to be considered by the jury in determining whether or not he was telling the truth. The jury was given this opportunity and chose to believe the defense.

Plaintiff contends as one basis for his surprise that the defendant Stocks said nothing in his deposition as to the time of arrest of Edwin John Davis but at the trial he testified that said arrest was made during the actual time when plaintiff claimed he was in the custody of the defendants. The deposition of John Stocks reveals at page 46 that the entry for April 27, 1955, in the arrest

book of the Sheriff was read at the deposition and the following appeared therein:

“Edwin John Davis. Held for Herb Snyder, Sheriff, Vernal, Utah.”

The time of day of said arrest did not appear in said entry but plaintiff was put on notice at the taking of the deposition that a man by the name of Edwin John Davis was arrested on said date and held for Herb Snyder, Sheriff at Vernal, Utah, and assuredly plaintiff cannot now complain that he had no opportunity to check or verify the details of said arrest, when it occurred, and matters connected therewith, such as long distance telephone calls between Sheriff Stocks and Sheriff Snyder. It is further pointed out that plaintiff's attorney did not even ask Sheriff Stocks in the deposition as to the time of day or night that Davis was arrested (Deposition of John Stocks, 46).

Although plaintiff has claimed surprise in the alleged variance of the testimony of John Stocks at the time his deposition was taken and at the time of trial to be a ground for new trial, the record of said trial is completely silent as to any claimed surprise while the trial was in session. At no time did plaintiff claim surprise due to said variance in testimony nor did plaintiff request any recess or continuance during the trial in order to check on and investigate the matters upon which plaintiff now claims surprise. Furthermore, the record shows that Sheriff Stocks was the first witness called for the defense and testified on the second day of trial, which was the

13th day of December, 1956, and the trial continued on December 14, 1956, and plaintiff had opportunity to check on the testimony of Sheriff Stocks and present rebuttal testimony on December 14. If plaintiff was surprised by the testimony of Stocks he had ample opportunity to check the accuracy of the statements made by Sheriff Stocks while on the witness stand.

Defendant Tibbetts was with defendant Stocks at all times in question on April 27, 1955, but plaintiff never took his deposition or exercised any rights of discovery to determine what Tibbetts knew about the matters in question and what he would testify to. Insofar as the defendant Tibbetts is concerned plaintiff clearly has no basis whatsoever for claiming surprise.

CONCLUSION

Defendants respectfully submit that the Trial Court did not abuse its discretion in denying plaintiff's motion for change of place of trial nor in denying plaintiff's motion for a new trial, and submit that the judgment of the Trial Court should be affirmed.

Respectfully submitted

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