1982

State of Utah v. Bryon Dale Peterson : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -vs- BRYON DALE PETERSON, Defendant- Appellant	:	No. 18298

BRIEF OF APPELLANT

Appeal from the Seventh Judicial District Court in and for Carbon County, State of Utah, the Honorable Don V. Tibbs presiding.

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STATEMENT OF NATURE OF THE CASE

This is a criminal proceeding brought by the State of Utah against Bryon Dale Peterson charging him with having committed one count of Aggravated Burglary in violation of Section 76-6-203, Utah Code Annotated 1953, as amended and two counts of Aggravated Assault in violation of Section 76-5-103 Utah Code Annotated 1953, as amended.

DISPOSITION IN THE LOWER COURT

After a jury trial on December 21 and 22, 1981 in the District Court in and for Carbon County, State of Utah, the defendant was found guilty of Aggravated Burglary, Aggravated Assault and Assault. The court pronounced judgment on January 18, 1982 and sentenced the defendant to be imprisoned in the Utah State Prison for 5 years to life for Aggravated Burglary, together with a $10,000 fine, 0-5 years for Aggravated Assault and 0-6 months in the Carbon County jail for Assault.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order of this Court reversing the judgment rendered at the trial and a ruling remanding the cause to the trial court for a new trial.

STATEMENT OF FACTS

On November 16, 1981, the defendant was arraigned on two counts of Aggravated Assault and a jury trial was set for December 21, 1981. On Thursday, December 17, 1981, the Hon. Don V. Tibbs, Visiting Judge from the Sixth Judicial District of the State of Utah, phoned counsel for the defendant (T.5) and advised him that a Motion for Joinder had just been filed that day by the State of Utah. (Record at p.32) The Motion sought to join one Count of Aggravated Burglary from a separate Information with the two counts of Aggravated Assault which were to be tried on December 21, 1981. Counsel for defendant expressed his oral objection to the Court and filed an Objection to Motion for Joinder on December 18,1981. (Record at p.35). On the morning of trial the Court granted the Motion for Joinder. (T.5).

The defendant was then tried for the offense of having burglarized the dwelling of Sandra Dotson at approximately 6:20-6:30 A.M. on September 1, 1981, and committing an Aggravated Assault on Sandra Dotson and Tammy Dotson while in the home.

The testimony of witnesses called by the prosecution showed that Sandra Dotson had a broken leg and was sleeping on the couch in the living room of her home on September 1, 1981 when she awakened at approximately

6:30 A.M. She saw a bald head coming through the doorway of the kitchen (T.11-13), and at first thought it was her boy friend, Joe Gross, who had done "things like that before" and who was bald.(T. 12, 28) She also thought it might be her ex-husband, Walter Dotson(T.15,33) The man then sat on her and placed his hands around her throat and struck her in the face (T.15, 16). She responded by slapping, scratching the assailant, and screaming for her 14 year old daughter, Tammy, who was sleeping in the basement bedroom. (T.18) She then drifted in and out of consciousness several times. (T. 18, 19).

Tammy Dotson testified that she was awakened at 6:30 A.M. by her alarm clock and then heard a scream from her mother. She immediately went upstairs and looked into the living room where she saw someone on top of her mother and assumed it was her mother's boy friend. (T.44, 54) The assailant then grabbed Tammy's wrist and started to choke her. She apparently went unconscious momentarily and when she awakened she saw the assailant choking and beating her mother. (T.47) Tammy then ran next door to the home of Edward McKinney who then ran to the Dotson home. (T.49, 51)

Edward McKinney testified that upon entering the Dotson living room he saw someone bent over Sandy. (T.90) The assailant then walked past Mr. McKinney and left the home. (T.93)

Richard Rathers testified that shortly after 6:00 A.M. on September 1, 1981 he was in his home across the street from the Dotson home when he heard screams. (T.99) He went outside, apparently saw Tammy Dotson running to the McKinney home (T.100) and then saw someone

coming up the driveway of the Dotson home and get into an orange Dodge van and drive away. (T.101-103) He wrote down the license number of the van and later gave it to the police. (T.104, 105)

Price City Police went to the home of the defendant in Price at approximately 7:00 A.M. and requested that he go to the Sheriff's Office with them (T.83) where he was placed under arrest.

The defendant claimed the defense of mistaken identity and called an alibi witness, Mr. Charles Peterson, father of the defendant, who testified that the defendant arrived home at 5:30 A.M. on September 1, 1981 and went to bed. (T. 150, 155) and was there at 6:00 A.M. (T.160) Officer Ed Shook testified that the license number of the vehicle seen leaving the Dotson home did not correspond to the license number of the defendant's vehicle, Marilyn McKinney also testified that the van seen leaving the Dotson home had a yellow fender on driver's side.(T. 174) State's Exhibits No. 2 and 3 which are photos of the Peterson van, revealed that defendant's vehicle does not have a yellow front fender.

POINTS ON APPEAL

POINT I

THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR JOINDER.

On themorning of the first day of trial the Court granted the State's Motion to join one count of Aggravated Burglary with the two counts of Aggravated Assault. The defendant contends that the joinder of the offenses was improper for the reason that the joinder did not afford the defendant adequate time to properly prepare a defense to a new information

containing the charge of Aggravated Burglary. The motion for joinder was filed on Thursday, December 17, 1981, four days before the trial was to begin on December 21, 1981. It is also significant to note that there was a weekend between the above two dates.

The chronology of events is important to defendant's contention and is set out as follows:

(A) Orginally two counts of Aggravated Assault and one count of Aggravated Burglary were filed with the Circuit Court in one Information and a Preliminary Hearing was held on November 9, 1981. At that time the Court dismissed the charge of Aggravated Burglary and bound the defendant over to the District Court on two charges of Aggravated Assault.

(B) The defendant was then arraigned in the District Court on the two charges of Aggravated Assault on November 16,1981, and trial was set to a jury for December 21, 1981.

(C) On November 30, 1981, the State of Utah, without notifying defendant's counsel that a new information had been filed, did in fact file a new information in the Circuit Court charging defendant with the offense of Aggravated Burglary.

(D) Counsel for defendant did not see the new Information nor did he know of its existence until shortly before the defendant was arraigned on the charge of Aggravated Burglary in the Circuit Court on December 16, 1981. At that time the defendant objected in Circuit Court to a Preliminary being held on that

day since neither the defendant nor his counsel were aware that the Preliminary Hearing would take place on that day. The circuit Court overruled defendant's objection and ordered that Preliminary Hearing go forward immediately.

(E) On Thursday, December 17, 1981, counsel for defendant received a telephone call from the Honorable Don V. Tibbs, Visiting Judge of Sixth Judicial District for the State of Utah, who advised defense counsel that the State had just filed a Motion to join the new Information containing the Aggravated Burglary charge with the Information containing the two counts of Aggravated Assault. (Record at p.32) (T.5) The Court further informed counsel that he felt inclined to grant the motion.(T.249) The defendant then filed his Objection to Plaintiff's Motion For Joinder on December 18, 1981. (Record at p. 35) On Monday, December 21, 1981 the Court granted the State's Motion for Joinder (T.5)

The material portions of Section 77-35-9, Utah Code Annotated 1953, as amended provide as follows:

> (a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offense charged arise out of a criminal episode as defined in section 76-1-401....
>
> (c) The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants, if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecustion were under such single indictment or information.

> (d) If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or defendants in an indictment or information, or by a joinder for trial together, the court shall order an election of separate trials of separate counts, or grant a severance of defendant, or provide such other relief as justice requires. (Underlining added for emphasis)
>
> A defendant's right to severance of offenses or defendants is waived if the motion is not made at least five days before trial. In ruling on a motion by defendant for severance, the Court may order the prosecutor to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

By joining the two informations the defendant was prejudiced by being prevented from consulting with his counsel on the new information prior to the time of trial and from assisting in the preparation of a proper defense. The joinder also effectively prevented the defendant from engaging in any discovery proceedings which are available under Section 77-35-16, Utah Code Annotated 1953, as amended.

Although the offenses contained in both information alleged that they occurred on the same date, the nature of the defenses are indeed substantially different and contain different elements. Primarily, the offense of aggravated burglary requires that there be an unlawful entry or that the defendant remain unlawfully on the premises, Section 76-6-202(1) Utah Code Annotated 1953, as amended. By the time defendant's counsel was aware that the charge of aggravated burglary was to be joined, witnesses had already been called, and it was too late at that point to investigate and subpoena witnesses with regard to whether the alleged entry into the home was illegal or with consent. The Court should also be aware that the defendant, between December 17, 1981 and the date of trial on December 21, 1981 was incarcerated in the Utah State Prison, a distance of 120 miles

from his counsel's office and was not reasonably available so that these issues could be discussed. The short period of time further prevented proper association between defendant and his counsel as to how the case should now be approached and what tactics might need to be changed in view of the fact that a new offense was being joined which contained different elements.

In State v. Mathis, 319 P.2d 134 (Utah 1957) the Supreme Court of the State of Utah addressed itself to the need for both sides to have a fair opportunity to prepare:

> The law is, or at least those who devote their lives to it like to think it is, the embodiment of reason and good sense. The duty of the court in administering justice carries deeper responsibilities than presiding over a game of tricks... Experience teaches that in the arranging of trials and the marshaling of witnesses, sometimes either the prosecution or the defense may inadvertently find itself unable safely to proceed to trial. While diligence in preparation should be insisted upon, the courts necessarily must be somewhat indulgent of perplexing situations which arise, to the end that both sides have a fair opportunity to present their respective cases. (319 P.2d at 136)

Section 77-35-9(d) provides as follows:

> "...a defendant's right to severence of offenses or defendants is waived if the motion is not made at least five days before trial."

The above statutory provision provides that a defendant can make a motion to severence of offenses if he does it at least five days prior to the trial. Yet, in this instance, the prosecution made a motion to join only four days prior to the time the trial was to commence and there was an intervening weekend.

It would seem that the State ought to be prohibited from making such a motion upon only four days notice when a defendant is bound by a five day notice period.

By way of summary, the aggravated burglary was dismissed by the Circuit Court on November 9, 1981 and the prosecution did not formally move to have the matter reheard by the Circuit Court until December 16, 1981, a period of five days prior to the trial.

It would appear that the State could have moved much more quickly on the new information had it so desired and not forced the defendant to be in the posision of determining four days prior to trial how it was going to not contend with a new charge which contained different offenses.

By opposing the Motion for Joinder defense counsel was in effect claiming that he did not have sufficient time to prepare for trial. The Utah Supreme Court in discussing continuances stated in State v. Moosman, 542 P.2d. 1093 (1975):

> The granting of a continuance of a case is a matter resting in the sound discretion of the trial judge, and that discretion will not be interfered with on appeal except where the court clearly abused its discretion in the matter. (542 P.2d at 1094)

Defendant asserts that the Court abused its discretion in this matter by ordering that the two information be joined in light of the particular circumstances.

POINT II

THE TRIAL COURT ERRED IN FAILING TO FORMALLY ARRAIGN THE DEFENDANT ON THE CHARGE OF AGGRAVATED BURGLARY.

The Court granted the State's Motion to join the charge of Aggravated Burglary with the two counts of Aggravated Assault on the morning of the first day of the trial. The Court then proceeded with the trial without ever arraigning the defendant on the charge of Aggravated Burglary. It did not occur to counsel until a recess in the trial that the defendant had not been formally arraigned on the charge contained in the new information. (T.119) The Court, in hearing a Motion for New Trial, acknowledged that no formal arraignment had occurred:

> THE COURT: Counsel, I mean--of course, I mean it really stunned me when I read your brief that there was no formal arraignment. Of course, I was a visiting Judge at this point and I had assumed he'd been arraigned on that second count. You advised me before and I might have even arraigned him on the first count, I don't remember, but I don't think so, though, (T. 240)

Section 77-35-10(a) provides as follows:

> Upon the return of an indictment or upon receipt of the records from the magistrate following a bind-over, the defendant shall forthwith be arraigned in the district court. Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

The language of the above statute appears to be mandatory in nature and requires that a formal arraignment be conducted in open court, that the information be read to the defendant or that the substance of

the charge be stated to him, that he be called upon to plead, and that he be furnished with a copy of the information. All of the foregoing were inadvertenely not complied with, undoubtedly because of the confusion and time constraints resulting from the Court's Order for Joinder.

The failure to arraign prejudiced the defendant by depriving him of certain rights which accrue only at or soon after the time of arraignment, e.g., the right to challenge the sufficiency of the complaint together with the right to make such motions prior to trial as would be appropriate, including, but not limited to, motion for discovery pursuant to section 77-35-16. motion for bill of particulars, possible motion for suppression of evidence, and right to request sufficient time to prepare for trial after arraignment.

Defendant further submits that the arraignment, particularly in a situtation such as this where a trial is held four days after the preliminary hearing, is a critical stage of the proceedings and should not be subject to waiver. In the alternative, if it is a proceeding subject to waiver, defendant asserts that it is incumbent upon the Court to advise the defendant of the attendant rights he would be waiving. The burden should be on the Court to properly arraign defendant. The defendant should not be placed in the position of having to request that his rights supposedly conferred by Section 77-35-10(a) be afforded him. To suggest that the burden should be shifted to the defendant to demand fundamental rights does not comport with due process.

POINT III

THE TRIAL COURT ERRED IN RULING THAT THE PROSECUTION WOULD BE PERMITTED TO REBUT DEFENDANT'S ALIBI WITNESSES.

The defendant timely filed with the Court and served on the prosecuting attorney his notice of alibi. (Record at p. 13) The State filed no list of witnesses whom they intended to call to contradict or impeach the defendant's alibi evidence.

Section 77-14-2 Utah Code Annotated 1953 as amended provides as follows:

> (1) A defendant, whether or not written demand has been made, who intends to offer evidence of an alibi shall, not less than ten days before trial or at such other time as the court may allow, file and serve on the prosecuting attorney at notice, in writing, of his intention to claim alibi. The notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, as particularly as is known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish alibi. The prosecuting attorney, not more than five days after receipt of the list provided herein or at such other time as the court may direct, shall file and serve the defendant with the addresses, as particularly as are known to him, or the witnesses the state proposes to offer to contradict or impeach the defendant's alibi evidence. (underlining added)
>
> (2) The defendant and prosecuting attorney shall be under a continuing duty to disclose the names and addresses of additional witnesses which come to the attention of either party after filing their alibi witness lists.
>
> (3) If a defendant or prosecuting attorney fails to comply with the requirements of this section, the court may exclude evidence offered to establish or rebut alibi. However, the defendant may always testify on his own behalf concerning alibi.
>
> (4) The court may, for good cause shown, waive the requirements of this section.

Counsel for defendant advised the court in chambers that he intended to call Mrs. LaVon Seely as an alibi witness. (T.169) Counsel for the State then advised the Court that he wanted to call Officer Dean Holdaway as a witness to rebut Mrs. Seely even though he had not complied with the statute in furnishing defense counsel with a list of the State's impeachment witnesses. (T.170). The court, after listening to both sides, decided that it would permit Officer Holdaway to rebut Mrs. Seely.(T.172)

Defendant contends that the trial court's ruling was an abuse of discretion in that the State did not show or demonstrate to the Court "good cause" to waive the requirements of the statute. The only reason given by the State was that they weren"t sure Mrs. Seely was the person who made a statement to Officer Holdaway. It is of utmost importance, however, to note that the State received defendant's alibi notice containing Mrs. Seely's name approximately 13-14 days prior to trial. The purpose of the notice by defense counsel was to afford the State the opportunity to evaluate and prepare for Mrs. Seely's testimony. The State could offer no credible reason to explain its failure to file its rebuttal witness list.

The Court reasoned as follows:

> THE COURT: Counsel, the statute also makes it discretionary to the Court based upon the circumstances of the case. My position is this: This man, this rebuttal witness, is an officer that has testified both at the Preliminary Hearing and has heretofore testified to this Court about this matter. I don't see where that causes any harm under these circumstances. I mean you would both have had an opportunity to cross-examine him before about this whole matter. You could have asked him anything you wanted and I don't see where that falls into

> this type of category of surprise. Anyway I don't want to argue about it, that's the ruling so I'm going to allow that. So, of course, if she's lying, I don't see how there's a rebuttal situation. (T.172)

The Court in its reasoning, however, fails to take into consideration the fact that defense counsel did not know at the Preliminary Hearing that the officer had any information to rebut the contention of Mrs. Seely. Defense counsel would have had no reason to cross-examine Officer Holdaway on that issue at Preliminary Hearing.

Mrs. Seely's testimony would have been that she was sleeping in the living room of the Peterson home when the defendant arrived home, that she saw him come in the front door and go to the kitchen and then go to his bedroom. (T. 169) The ruling of the Court permitting the officer to rebut her testimony at the last moment caused a chilling effect on her and she did not testify. The practical result was that the defendant was deprived of a witness who would corroborate the alibi testimony of Mr. Charles Peterson.

In Wardius v. Oregon, 412 U.S.470, 93 S.Ct. 2208, 37L.Ed2d 82(1973) The United States Supreme Court held that the Fourteenth Amendment forbids enforcement of "alibi rules unles reciprocal rights are given to criminal defendants' (412 U.S. at 472, 93 S.Ct. at 2211) The Utah Supreme Court in Gentry v. Smith, 600 P.2d 1008(1979) emphasized the fact:

> "...the State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses."

See also State v. Haddenham 585 P.2d 447 (1978) and State v. Case 547 P. 2d 221 (1976)

POINT IV

THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL UPON THE GROUNDS THAT THE STATE ASKED A WITNESS AN IMPROPER QUESTION.

Counsel for Defendant called Evan Reid as a witness on behalf of the defendant. On cross-examination the prosecutor asked the question twice, "Are you Bryon Peterson's parole officer".(T. 161, 180). The State continued to pursue Mr. Reid's employment and was finally told by the Court to not get into that area. (T. 181).

The question propounded by the State is by its very nature "loaded" and implies that the defendant has been convicted of a crime.

Evidence of the defendant's conviction of a crime is not admissible at trial unless the defendant himself takes the witness stand and responds to the question, "Have you been convicted of a felony?" Rule 21 of the Utah Rules of Evidence provides:

> Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility...

The defendant in this case did not take the witness stand for the reason that he had been previously convicted of a felony. Nevertheless, the prosecution deliberately attempted to circumvent the defendant's rights in this regard by propounding the question "Are you the defendant's parole officer?" Certainly such a question carries significant weight with the jury and unduly influences their minds and prejudices them against the defendant. Additionally, there wasno method of undoing the damage done by the Prosecutor's question.

Defendant filed a Motion for New Trial and cited the above impropriety as a cause for new trial. (Record at P. 108) The motion was denied by the Court.(T.254)

The instant case is distinguishable from State v. Case, 547 P.2d 221 (1976) wherein the Utah Supreme Court held that reference in the testimony to the Fact that defendant had been incarcerated in the Utah State Prison was not ground for a mistrial. In Case the reference to the prison was the result of an unintentional slip of the tongue whereas the question prosed in the present case was a deliberate and intentional attempt to discredit the defendant's character when it wasn't in issue.

Section 77-35-24(a) Utah Code Annotated 1953, as amended states:

> The court may, upon motion of a party or upon its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

Defendant suggests that the question propounded falls into the category of improprieties contemplated by the statute. Certainly it had a substantial adverse effect upon the rights of the defendant

POINT V

THE TRIAL COURT ERRED IN REFUSING TO GRANT DEFENDANT'S MOTION TO RULE AS A MATTER OF LAW THAT THE BURGLARY AND ASSAULTS WERE NOT AGGRAVATED.

Immediately after the prosecution rested its case the defense moved the Court to strike the word "aggravated" from each of the three

counts contained in the Information. (T. 116) The Court denied the Motion. (T. 119) The jury returned a verdict of guilty to Aggravated Burglary and Aggravated Assault on Sandra Dotson and guilty of Assault (without the "Aggravated") on Tammy Dotson. Accordingly, this Appeal speaks only to verdicts of guilty to Aggravated Burglary and one count of Aggravated Assault on Sandra Dotson.

Section 76-5-103 defines Aggravated Assault as follows:

> A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and:
> (a) He intentionally causes serious bodily injury to another; or
> (b) He uses a deadly weapon or such means of force likely to produce death or serious bodily injury.

The phrase "serious bodily injury" is defined in Section 76-1-601:

> (9) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ or creates a substantial risk of death.

The testimony of Sandra Dotson makes it clear that she did not suffer any serious bodily injury. She did not require any medical attention after the assault and refused to go to the hospital. (T.31, 38, 39) Sandra also make no claim that any kind of a deadly weapon was used. There is also no evidence that she suffered any permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ, nor did her bodily injury create a substantial risk of death.

In State of Utah in the Interest of William N. Besendorfer, 568 P.2d 742(1977 Utah) the Utah Supreme Court agreed with the defendants

contention that an aggravated assault had not been committed where the victim had been kicked in the legs, struck in the face several times by a fist and required dental attention for his teeth.

The record in the instant case does not reveal that Sandra Dotson received any injuries which were more serious than that sustained by the victim in Besendorfer. The record is also void of direct evidence which would show the defendant used force or means likely to produce death or serious bodily injury.

Addressing now the issue of whether an Aggravated Burglary was committed, defendant contends it was not as a matter of law in that "physical injury", as contemplated by Section 76-6-203(1)(a) was not committed. Aggravated Burglary is defined by that section as follows:

> A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary, the actor or another participant in the crime:
> (a) causes physical injury to any person who is not a participant in the crime; or
> (b) Uses or threatens the immediate use of a dangerous or deadly weapon against any person who is not a participant in the crime; or
> (c) Is armed with a deadly weapon or possesses or attempts to use any explosive or deadly weapon.

The phrase "physical injury" is not defined in the Utah Criminal Code and defendant submits that the small bruises and cuts sustained by Sandra and Tammy Dotson were not sufficient in magnitude to constitute the type of "physical injury" contemplated by the statute. The term "physical injury" is sufficiently vague so as to make it unclear as to the degree of seriousness of injury deemed necessary by the legislature to constitute Aggravated Burglary. Accordingly, defendant also contends the statute is void for vagueness.

POINT VI

THE IMPOSITION OF A $10,000.00 FINE WAS EXCESSIVE AND AN ABUSE OF THE TRIAL COURT'S DISCRETION

For the offense of Aggravated Burglary the Court imposed a prison term from 5 years to life with a $10,000 fine. Defendant contends that the amount of the fine, although within the statutory parameters, was excessive under the circumstances and disproportionate to the offense committed.

In State vs. Nance, 438 P.2d 542(1968), the Utah Supreme Court discussed whether the length of a prison sentence was excessive or cruel and unusual but it would appear that the test therein set forth would be applicable to fines as well:

> "Our inquiry is limited to the question of whether the sentence imposed in proportion to the offense committed is such as to shuck the moral sense of all reasonable men as to what is right and proper under the circumstances. 438 P.2d at 544.

See also State v. Teague, 336, P.2d 338, 340 (1959)

The circumstances here show that neither of the victims of the assault or the Burglary incurred any permanent injuries or disfigurement nor did either of them require any medical attention or incur medical expenses. The defendant is deprived of his liberty for 5 years to life as well as suffering other disabilities imposed by law upon a convicted felon. The defendant is impecunious as he qualified for appointed counsel at trial and on appeal. He has no means by which he can reasonably be expected to pay the fine. In this sense, the Trial Court has imposed a condition on the defendant which borders on the edge of impossible to

perform and therefore shocks the moral sense. Defendant submits that there is a point of diminishing returns in sentencing and that the fine imposed will not accomplish any purpose which the prison sentence will not.

POINT VII

THE VERDICT IS NOT SUPPORTED BY THE EVIDENCE.

Defendant's theory of defense at trial was that the person who entered the home of Sandra and Tammy Dotson on September 1, 1981 was someone other than the defendant. It is the contention of defendant that the jury verdict placing him in the home was in error and is not supported by the evidence given at trial.

Sandra Dotson, Tammy Dotson, and Edward McKinney all testified that the defendant was the assailant. (T. 18, 46, 91) Consider, however the evidence produced by defendant that showed he was not at the Dotson home at the time of the offense.

(a) Defendant's father produced and entered into evidence the page from his diary for September 1, 1981 which reflects that the defendant arrived home at 5:30 A.N.

(b) The license number of the van seen leaving the Dotson residence was NV 5500 while the van of the defendant bore the license number NV 5301. (T. 71, 73, 74)

(c) The assailant had a beard of about 1 1/2 months growth. (T. 91) However, the defendant approximately 30 minutes after the assault took place had no beard. See Exhibit No. 12 and also the testimony of Officer Holdaway at p. 128 of Transcript.

(d) Marilyn McKinney stated that the van which drove away from the Dotson home had a yellow front fender on the driver's side. (T. 174) Exhibits No. 2 and 3 (photos of defendant's van) show that the defendant's van does not have a yellow front fender.

(e) Sandy Dotson testified that she scratched the assailant. (T.18) but Officer Holdaway said that he saw the defendant in the nude at 7:00 A.M. that morning but noticed no scratches or bruises on him. (T.87)

(f) Sandra Dotson did not notice the odor of alcohol on the assailant although he at times was sitting on her. (T.37) The defendant however, had consumed approximately 1 1/2 fifths of whiskey in the hours shortly before the assault and obviously would have had an odor of an alcoholic beverage about him. (T.134).

It is also significant to note that the identifications made by the three witnesses at the Dotson home were made in almost dark conditions and Ed McKinney and Tammy Dotson had only seen the defendant on one earlier occasion. The testimony of Sandra Dotson is naturally suspect for the reason that she first thought the assailant was her boyfirend, Joe Gross, and then thought it might be her ex-husband, Walter Dotson. Her credibility is further weakened by the fact that she was taking prescription medications, e.g. Percodan, Valium, and Dalimane on the night of the incident. (T.35)

Defendant contends that the verdict of the jury is not supported by the evidence in light of the above. The testimony of the three witnesses is clouded with considerable difficulties affecting its weight whereas

that produced by the defendant is convincing that he was not present in the Dotson house when the attack occured.

POINT VIII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO AMEND THE INFORMATION AFTER IT HAD RESTED ITS CASE.

On the morning of the second day of trial and after the State had rested the State moved the Court to amend the Information to state that in committing Aggravated Assault the defendant used " such means or force likely to produce death or serious bodily injury." (T.166) Defendant's objection (T. 166) was overruled and the motion was granted. (T. 167)

Permitting the Information to be amended on the last day of trial prejudiced the substantial rights of the defendant. Section 77-35-4(d) Utah Code Annotated 1953, as amended provides:

> The Court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.

Defendant acknowledges that no additional or different offense was charged by the amendment, but alleges that his substantial rights were prejudiced. The defendant came to trial prepared to defend against the claim that he had caused "serious bodily injury" to Sandra Dotson and Tammy Dotson under subparagraph (a) of 76-5-103. The defendant did not come to trial prepared to defend against a claim that he used "means or force likely to produce death" under subparagraph (b)

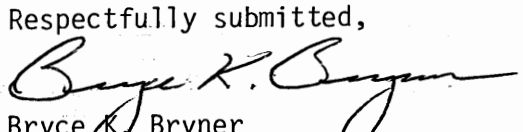
of Section 76-5-103. By granting the State's Motion the burden was then placed on counsel to quickly obtain a medical expert who could testify as to whether the conduct of the assailant presented a risk of causing death to the victim.

Counsel and defendant had previously gone through a Preliminary Hearing in which no attempt to show or claim was made that the means of force used were likely to produce death. Counsel should have been justified in relying upon the allegations contained in the Information on which defendant was bound over. It is not reasonable to expect the defendant to come to trial armed with witnesses to rebut and defend against possible new allegations or elements in the offenses charged. Counsel cannot reasonably be expected to anticipate the amendments which might be made by the State. The Trial Court by granting the State's motion placed a burden on defendant which was not anticipated and which deprived the defendant of his substantial rights.

CONCLUSION

The cumulative effect of the errors and improprieties committed at trial would justify this Honorable Court in reversing the verdict and judgment and the cause should be remanded back to the Trial Court for a new trial for the reasons set forth in the preceding points.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, BRYCE K. BRYNER, hereby certify I personally served three (3) copies of the above and foregoing BRIEF OF APPELLANT upon DAVID WILKINSON, Attorney General of the State of Utah, by delivering said copies to the Office of the Attorney General at 236 State Capitol, Salt Lake City, Utah this 28th day of September, 1982.