1983

State of Utah v. Ronald Dale Easthope : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18310
RONALD DALE EASTHOPE,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a jury verdict convicting appellant of Aggravated Sexual Assault, a first-degree felony, in the Third Judicial District Court in and for Salt Lake County, the Honorable Dean E. Conder, Judge, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Ronald Dale Easthope, appeals from a conviction of aggravated sexual assault in the Third Judicial District Court, Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

Appellant was charged with one count of aggravated sexual assault, a first-degree felony, in violation of Utah Code Ann., § 76-5-405 (1978). On February 8, 1982, appellant was found guilty of the crime as charged by a jury. On February 23, 1982, Third District Judge Dean E. Conder sentenced appellant to the statutory term of five years to life in the Utah State Prison. Judge Conder further recommended that appellant serve thirty years on said sentence prior to release or parole (R. 124).

RELIEF SOUGHT ON APPEAL

Respondent requests that the verdict and judgment rendered in the lower court be affirmed.

STATEMENT OF FACTS

On September 22, 1981, appellant was charged by information with commission of the crime of aggravated sexual assault, a first-degree felony (R. 16). The assault was committed in the victim's apartment at 1010 Downington Avenue, in the Sugarhouse area of Salt Lake City. Appellant had been convicted of two counts of rape and robbery in 1971 (T. 400) and, despite the absence of any evidence in the record on appeal, it is conceded by respondent that appellant was known as the "Sugarhouse Rapist" by some members of the legal and law enforcement communities.

On October 6, 1981, following appellant's arrest, Deputy Salt Lake County Attorney Ernie Jones filed a Motion and Order for Production of Hair and Body Fluid Samples (R. 7-8). The state's Motion was heard by Fifth Circuit Judge Arthur G. Christean on October 8, 1981 (R. 6) and granted on October 14, 1981 (R. 8). Hair and blood samples were obtained from appellant.

The preliminary hearing was held on October 22, 1981 before Judge Christean; appellant was bound over for trial in the district court at the conclusion of the hearing (R. 5). The hearing took place with very little publicity (T. 3).

On December 2, 1981, counsel for appellant filed a Motion to Suppress the hair and blood samples based upon his contention that Judge Christean was without jurisdiction to issue the Order compelling the samples (R. 22). Appellant filed an Amended Motion to Suppress on December 4, 1981, adding state and federal constitutional objections to the samples (R. 27); the state filed a memorandum in opposition thereto (R. 35-40). Following argument on December 4, 1981 (R. 26), Third District Judge Peter F. Leary denied appellant's Motion to Suppress (R. 41).

Appellant's four-day jury trial began on February 3, 1982, before the Honorable Dean E. Conder, Third District Judge. Before the trial started, a meeting in chambers was held to discuss appellant's Motion to Sequester the Jury (R. 42; T. 2-5). No members of the press were present in the courtroom at that time and Judge Conder denied the Motion with leave to counsel for appellant to renew the Motion (T. 3).

Jury voir dire was begun with a panel of twenty prospective jurors (R. 57). Three members of the panel were excused by the court, but it was shown that none of the panel of twenty either knew the appellant (T. 11) or had heard of the incident (T. 12). During voir dire, the panel was admonished not to "read, hear, listen to or see anything in the news media regarding this case; whether or not it's by television, newspaper or whatever means" (T. 25-26).

At the conclusion of the victim's (the state's first witness) testimony during the first afternoon of trial, Judge Conder recessed the proceedings and convened a meeting in chambers between counsel and Dick Allgire, KUTV, Channel 2. Judge Conder then entered an order prohibiting the media from referring to appellant as the "Sugarhouse Rapist" or to any of appellant's "activities prior to the trial that would in any way show his involvement with the law" (T. 91-92). Counsel for KUTV unsuccessfully sought injunctive relief from this Court from Judge Conder's Order (T. 121).

On the second morning of trial, appellant's counsel renewed the Motion to Sequester and asked that the individual jurors be polled. Counsel based the renewal of the Motion upon two news broadcasts from the preceding evening. Judge Conder denied both the Motion and the request, stating:

> I heard the news report. I don't think that that was prejudicial . . . I think that if we call them in and ask them about it we only fan the flames even worse.

(T. 121).

During the course of the trial, Judge Conder repeatedly admonished the jurors to refrain from any contact with the news media (T. 35, 117, 266, 323, 384). No violations of the judge's Order or any instances of inadvertent exposure of jurors to publicity were alleged.

On the final day of trial, appellant took the stand and acknowledged the prior rape and robbery and convictions and his extensive incarceration (T. 400-402, 418-419). The jury deliberated for less then two hours (T. 490, 491) and returned a verdict of guilty as charged (T. 491).

ARGUMENT

POINT I

THE CIRCUIT COURT JUDGE PROPERLY REQUIRED APPELLANT TO PERMIT THE TAKING OF BLOOD AND HAIR SAMPLES.

Utah Code Ann., § 77-35-16(h) (Supp. 1981)* states, in pertinent part:

> (h) Subject to constitutional limitations, the accused may be required to:
> . . . .
> (6) Permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;
> . . . .

Pursuant to § 77-35-16(h), Deputy Salt Lake County Attorney Ernie Jones filed a "Motion and Order for Production of Hair and Body Fluid Samples" and an accompanying "Notice of Hearing" (R. 7-9). On October 14, 1982, Fifth Circuit Court

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*All statutory references herein are to Utah Code Annotated.

Judge Arthur G. Christean granted the Motion and ordered appellant to "surrender hair, body and pubic hair samples together with saliva and blood fluids . . ." (R. 8). Appellant contends that Judge Christean's Order exceeds the jurisdiction vested in a magistrate handling a felony case.

A. A MAGISTRATE IN UTAH HAS STATUTORY AUTHORITY TO ORDER THE TAKING OF HAIR AND BLOOD SAMPLES.

Van Dam v. Morris, Utah, 571 P.2d 1325 (1977), establishes the principle that:

> The authority of a magistrate is purely statutory. A judge, who sits as a magistrate does not carry his court or his judicial attributes with him, except to the extent they inhere in the office of magistrate.

Id. at 1327. The statutory authority for Judge Christean's Order in the instant case is § 77-35-16(h) (Supp. 1981). The authority given therein is not, contrary to appellant's position, limited to the exercise by a "court"; the authority may be invoked at all stages of the criminal process. Because of the absence of any limiting language in § 77-35-16(h) (e.g., the specific references to "the court" in § 77-35-16(f),(g)), it must be assumed that the legislative intent was to confer the powers of § 77-35-16(h) upon both magistrate and trial judge alike.

In Holman v. Superior Court of Monterey County, 174 Cal. Rptr. 506, 629 P.2d 14 (1981), the California Supreme Court was presented with a case similar to the one at bar. Defendants in a narcotics case sought discovery of names of witnesses, reports and physical evidence prior to the preliminary hearing. The prosecutor resisted the efforts at discovery by asserting that the magistrate lacked jurisdiction to issue discovery orders because only "courts" may order pretrial discovery. In finding that limited discovery should be available prior to the preliminary hearing, the unanimous court stated:

> As we indicated above, it is the general rule that in the absence of contrary legislation courts have the inherent power to order appropriate pretrial discovery. We believe a similar inherent power exists, and may be exercised, by magistrates ancillary to their statutory power to determine whether there is probable cause to hold the defendant to answer. The magistrate's statutory role is directed toward making a preliminary assessment of the truth or falsity of the charges filed against the defendant; pretrial discovery may well assist in such a determination (citation omitted).

629 P.2d at 17. § 77-35-16(h) (Supp. 1981) provides the statutory authority that was missing in Holman, thereby supplementing the inherent power of a magistrate with an express legislative prerogative.

Appellant cites Van Dam v. Morris in support of his argument that a magistrate lacks jurisdiction to issue orders compelling the surrender of hair and blood samples. Van Dam must be limited to its holding, i.e., that a magistrate conducting a preliminary hearing may only discharge the defendant "without prejudice" or bind him over for trial in the district court. A magistrate cannot exceed the jurisdiction over a case granted to him by statute. The issue in the instant case is not one of jurisdiction; the magistrate's order compelling hair and blood samples in no way divests the district court of the ultimate jurisdiction over the felony case.

Appellant makes much of the Memorandum Decision of Third District Judge Dean E. Conder in Cannon v. Keller, Misc. No. M-80-88 (Third Dist. Ct., December 15, 1980) (P. 24). Because Judge Conder's decision is on appeal to this court as Cannon v. Keller and Ossana, No. 18441 (Utah Sup. Ct., filed May 6, 1982), the case is deserving of brief discussion here. In Cannon v. Keller, the defendant in a narcotics case sought the identity of a confidential informant by filing a discovery motion under § 77-35-16 (Brief of Appellant Ossana at 2). Fifth Circuit Judge Larry R. Keller granted the defendant's motion. Upon petition by the prosecution, Judge Conder then issued a writ of mandamus that is the basis of the appeal to this court (Id. at 2-4).

Judge Conder's ruling was based upon his finding that:

> Therefore, if the defendant has any right to discovery before a committing magistrate it must be established by the Constitution or statute. Our Constitution is silent on the matter (except for "due process" question) and the statute is ambiguous to say the least.

(R. 25). In fact, there is no express statutory authority in § 77-35-16 (Supp. 1981) for a magistrate to order the prosecution to disclose the name of a confidential informant prior to the preliminary hearing. § 77-35-16(a)(5) (Supp. 1981) provides only discretionary authority at best:

> (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
>
> . . . .
>
> (5) Any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

The crucial distinction between Cannon v. Keller and the instant case is the difference between colorable, discretionary authority and express power. A magistrate in Utah has express authority to compel the taking of hair and blood samples.

B. PRACTICAL CONSIDERATIONS REQUIRE THE TAKING OF HAIR AND BLOOD SAMPLES AT THE EARLIEST POSSIBLE TIME.

Appellant states, at page five of his Brief, that:

> The fair import of the language of Rule 16 evidence [sic] a legislative intent that the discovery process be under the direction of "the court" having jurisdiction to try the case, and not the magistrate who merely conducts the probable cause hearing.

If appellant's argument were to be followed, it would be necessary for a district judge to specifically authorize every post-arrest procedure. The district judge would be required to authorize, for example:

1. the appearance of the accused at a line-up;

2. the fingerprinting of the accused; or

3. the taking of hair and blood samples.

Some of these procedures (e.g., line-up, fingerprinting) could precede the filing of an information in many cases. The district judge would be required, without the benefit of a file or a single pleading, to supervise each step in the progression of the case from arrest through sentencing. The implications of such a cumbersome process are obvious.

Other practical considerations are the statutory and constitutional time constraints to which a prosecutor must adhere. The State simply must have an expeditious procedure

whereby physical evidence can be obtained and (1) processed quickly for presentation at the preliminary hearing, if necessary, or (2) submitted for expert forensic analysis promptly enough to ensure a timely return for introduction at trial. If a prosecutor were required to present a motion to a district judge and obtain an order prior to securing the evidence, the entire sequential chronology could break down.

In summary, the language of § 77-35-16(h) is adequate authority for a magistrate to order the taking of hair and blood samples. § 77-35-1(b) (Supp. 1981) provides:

> These rules shall govern the procedure in all criminal cases in the courts of this state except juvenile court cases. <u>These rules are intended and shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unnecessary expense and delay</u> (emphasis added).

Appellant has failed to demonstrate any legal precedent or inherent prejudice that would deny the magistrate the authority to issue the Order in this case. In light of the statutory authority and the clear expression of legislative intent found in § 77-35-1(b), the Order at issue must be permitted to stand.

POINT II

THE EXTRACTION OF BLOOD FROM APPELLANT DID NOT REQUIRE A SEARCH WARRANT.

The extraction of blood from appellant was a minor intrusion conducted under carefully controlled conditions. The procedure followed notice to appellant, an adversarial hearing on the question and a review by a neutral and detached magistrate. If this court should find that the magistrate lacked authority to issue the subject Order, then it should find that no search warrant was required under the circumstances.

Appellant has recited enough of the facts of the controlling case, Schmerber v. California, 384 U.S. 757 (1966), to establish a basis for analysis. The concluding sentence of Justice Brennan's opinion in Schmerber is the key language:

> That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772. Therefore, if the procedure in the instant case is to be permissible, the intrusion must be minor and conducted under "stringently limited conditions."

The degree of intrusion in this case was like that in Schmerber--an extraction of blood by a competent medical technician (T. 304-05, 322). The conditions of the extraction were also stringently limited in that: (1) an information and warrant of arrest had been filed and issued, (2) the appellant

had been arrested and was in jail, (3) the state had filed a motion and gave notice to appellant and his attorney, (4) an adversarial hearing was held, and (5) the order was issued by a neutral and detached magistrate (who, notably, limited the scope of the intrusion sought by denying the state's request for a sperm sample (R. 8)). Appellant was afforded greater protection (e.g., notice, hearing) than if a search warrant had been sought. As is stated in Schmerber,

> The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime" (citations omitted).

384 U.S. at 770. The inferences in the instant case were drawn by a neutral and detached magistrate, thereby avoiding the consequences of a constitutionally infirm search.

The legislature has reflected the judgment that the extraction of blood under circumstances does not constitute an "unreasonable intrusion." § 77-35-16(h). See also: State v. McCumber, Utah, 622 P.2d 353 (1980). There being no specific constitutional prohibition to the procedure followed in the instant case, the obtaining of appellant's blood sample must be permitted to stand.

POINT III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO SEQUESTER THE JURY.

On January 22, 1983, counsel for appellant filed a Motion to Sequester the Jury and Notice of Hearing (R. 42). On the first morning of trial, the trial judge denied appellant's Motion (R. 48; T. 3), but granted counsel leave to renew the Motion (T. 3). Counsel for appellant renewed the Motion the following morning (T. 120), and again, in the form of a Motion for Mistrial, at the conclusion of the state's case (T. 369). Both Motions were denied by the trial court. Appellant alleges error in the failure to sequester the jury.

A. SEQUESTRATION OF THE JURY IS A MATTER OF DISCRETION FOR THE TRIAL JUDGE.

Section 77-17-9(1) (Supp. 1981) states:

> The court, at any time before the submission of the case to the jury, may permit the jury to separate or order that it be sequestered in charge of a proper officer.

The language of the statute is permissive and leaves to the judgment of the trial judge the continuing power to sequester. The trial judge properly refused to sequester the jury in this case.

Each case must be assessed on its own facts and circumstances. See, e.g., State v. Pierre, Utah, 572 P.2d 1338 (1977); 72 ALR 3d 100, 131. In the instant case, Judge Conder initially determined that sequestration of the jury was not called for and also guarded against the need arising during the course of the trial:

(1) It was confirmed that the preliminary hearing was conducted without "much publicity" (T. 3);

(2) Sufficient voir dire was conducted to show that:

(a) none of the panel of twenty prospective jurors knew the defendant (T. 11),

(b) none of the panel had heard of the incident (T. 12), and

(c) all members of the panel would adhere to the judge's admonitions on media exposure (T. 25-26);

(3) The judge repeatedly admonished the jurors concerning publicity (T. 35, 117, 266, 323, 384);
(4) The judge directed the prosecutor to refer to the site of the crime as "1010 Downington Avenue" (T. 4)--specifically to avoid any reference to "Sugarhouse"; and

(5) The trial court ordered the press to refrain from using the term "Sugarhouse Rapist" and from commenting "about Mr. Easthope's activities prior to the trial that would in any way show his involvement with the law (T. 91-92).

The language that most clearly reflects the meticulous care taken by Judge Conder to avoid any prejudice to the defendant is:

> I'm concerned about any publicity on it. I'll keep a close eye on it and admonish the jurors again to avoid any news broadcasts on it. I think that if we call them in and ask them about it we only fan the flames even worse (T. 121).

B. APPELLANT HAS FAILED TO MEET HIS BURDEN OF DEMONSTRATING A SUBSTANTIAL LIKELIHOOD OF OR ACTUAL PREJUDICE.

In State v. Andrews, Utah, 576 P.2d 859 (1978), this court stated:

> It is the general rule that one who wishes to challenge a judge's allowance of juror separation must demonstrate either actual prejudice or a substantial likelihood that some prejudice did result from the refusal to sequester (citations omitted).

Id. at 859. Appellant can only employ speculative language to suggest the possibility of prejudice and he fails entirely to demonstrate any adverse effect of his conjecture. Absent such a showing by appellant, this court should adhere to the general rule and permit the decisions of the trial judge to stand.

POINT IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO POLL THE JURY DURING TRIAL.

Appellant asserts that the trial judge's failure to poll the jurors on the second morning of the trial constitutes reversible error (T. 120-21). Appellant has failed to establish any degree of prejudice that would require the trial judge to investigate by polling the jurors.

A. THE NEWS ACCOUNTS OF APPELLANT'S TRIAL WERE NOT PREJUDICIAL.

The trial judge in the instant case heard the news reports that appellant claims were prejudicial (T. 121). He determined that the reports were not prejudicial and appellant has failed in this appeal to demonstrate otherwise. Appellant has failed to establish an adequate appellate record for his basic premise, i.e., that appellant's reputation as the "Sugarhouse Rapist" was so widely known that the jurors "may easily have caught" a subsequent speculative "connection (Brief of Appellant at 17). Moreover, appellant states, "And at the appellant's arrest and preliminary hearing, the media emphatically told the public that the 'Sugarhouse Rapist' was again being tried for rape" (Id. at 17). This assertion is inconsistent with the following colloquy on the first morning of trial:

> THE COURT: Was there much publicity in connection with the preliminary hearing?
>
> MR. BROWN: No, there wasn't.
>
> THE COURT: I didn't see any.
>
> MR. BROWN: No television coverage at all at the preliminary hearing, and I never sought any news coverage (T. 3).

There is simply no evidence in the record concerning any electronic or print media coverage that was prejudicial to appellant.

Appellant's own citation of United States v. Jones, 542 F.2d 186 (4th Cir. 1976), is dispositive of the issue at hand. In Jones, the asserted prejudicial publicity during trial included several newspaper articles which were "accurate condensed statement[s] of testimony actually admitted into evidence and heard by the jury", news accounts of threats to the judge and prosecution and a tangentially related news story "obliquely" implicating the defendant in drug trafficking. 542 F.2d at 196-97. The Jones court, relying upon its earlier holding in United States v. Hankish, 502 F.2d 71 (4th Cir. 1974), stated:

> '[W]e do not hold that every newspaper article appearing during trial requires such protective measures. Unless there is substantial reason to fear prejudice, the trial judge may decline to question the jurors.' It follows then that whenever a claim of in-trial prejudicial publicity arises, the threshold question, or, as the Court in United States v. Pomponio, supra, put it, the 'initial determination' for the trial court is whether the publicity rises to the level of substantial prejudicial material. If it does not rise to such a level, the trial court is under no duty to interrogate the jury or to take the steps mandated by Hankish. And whether it does rise to the level of substantial prejudice requiring that procedure is ordinarily a question 'committed to the trial court's discretion' and 'the scope of this judicial discretion includes the responsibility of determining the extent and type of investigation requisite to a ruling on the motion' (emphasis original).

542 F.2d at 194. The Fourth Circuit went on to find that the publicity was not prejudicial.

Appellant fails to establish the predicate of his own argument:

> If the trial court fails to make at least an initial inquiry (where media reports are prejudicial), the accused is thereby denied the opportunity to find out whether or not the jurors have been exposed to the reports . . . (emphasis added).

(Brief of Appellant at 14). The limited news reports in the present case were not prejudicial and did not trigger a duty of inquiry on the part of the trial judge.

B. ASSUMING, ARGUENDO, THAT THE LIMITED PUBLICITY WAS PREJUDICIAL, THE JURY WAS EXPOSED TO ALL SUCH INFORMATION THROUGH THE APPELLANT'S OWN TESTIMONY AT TRIAL.

All of appellant's protestations concerning publicity of his prior rape convictions became academic at the point during the trial when appellant took the stand and testified about the prior rapes, convictions and incarceration (T. 400-402, 418-19). As is stated in Jones, supra,

> With hardly an exception, the cases in which substantial prejudicial publicity during trial was found, the publicity involved information about the defendant that would not be admissible before the jury or that was not in fact put before the jury in court (citations omitted).

542 F.2d at 195. The evidence in the case at bar was put before the jury very clearly by appellant himself. Appellant cannot now claim error.

CONCLUSION

Appellant's argument with respect to a magistrate's authority to issue orders compelling the taking of hair and blood samples ignores the language of § 77-35-16(h)(6) and is an attempt to stress form over substance. The argument would be more compelling if appellant could demonstrate some prejudice to his rights resulting from the procedure authorized by statute. He cannot. Section 77-35-16(h)(6) is specific, reasonable authority for the issuance of the Order in this case.

If this court should find that Judge Christean had no authority to issue the subject Order, respondent's position requires strict Fourth Amendment analysis in that the blood sample was obtained without a search warrant and the taking does not fit within any of the classicly defined exceptions to the warrant requirement. However, close scrutiny of Schmerber v. California reveals that the obtaining of the blood sample in the case at bar was constitutionally permissible because it followed a review by a neutral and detached magistrate, it was a minor intrusion and it was conducted under stringently limited conditions. The safeguards of the Fourth Amendment were honored and the obtaining of the blood sample should be validated.

Appellant's contentions concerning prejudicial publicity and possible jury bias have illusory appeal because of appellant's past notoriety. However, the past notoriety had, perhaps surprisingly, apparently faded during his ten-year incarceration. Publicity at the arrest and preliminary hearing stages was minimal. When counsel for appellant raised the issue of possible prejudice to the trial judge, immediate, comprehensive preventive measures were instituted. Sequestration of the jury is a matter within the discretion of the trial judge and respondent submits that Judge Conder properly exercised his discretion in this case.

The verdict and judgment in the lower court should be affirmed.

Respectfully submitted this 15th day of February, 1983.

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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 Lynn R. Brown and J. Mark Andrus, Attorneys for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 15th day of February, 1983.