1971

State of Utah v. Earl Ward Clements : Brief of Appellant

Utah Supreme Court

Beaslin, Nygaard, Coke, & Vincent; Attorneys for AppellantVernon B. Romney; Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent,

v.

EARL WARD CLEMENTS, Defendant-Appellant.

ON APPEAL FROM THE DISTRICT COURT
OF THE SECOND JUDICIAL DISTRICT IN
AND FOR WEBER COUNTY, BEFORE THE
HON. CALVIN GOULD, J.

BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE STATE OF UTAH

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EARL WARD CLEMENTS, Defendant-Appellant.

BRIEF OF APPELLANT

INTRODUCTORY STATEMENT

Defendant appeals from the finding of the court below, sitting without a jury, of the conviction of second degree burglary, and from the sentence of the court to the Utah State Prison.

The matter should be reversed without direction, or in the alternative reversed and remanded for a new trial on the merits consistent with procedural due process and consistent with a proper indictment for the crime committed.

STATEMENT OF FACTS

The record on appeal consists of two volumes, one of which contains pleadings, minute entries and similar papers, together with and numbered within the file separately, which is the transcript of proceedings upon the trial. The other volume is a record of proceedings and the minute entries made, filed at a later date, consisting of five unnumbered pages appearing to be the transcript of proceedings at the arraignment of the defendant-appellant. References to the first volume will be designated by (R. page number, Tr. page number). References thus to the record where they are made to the trial transcript will show a parallel citation, references to the record of proceedings for the arraignment and

appearing in an unconnected and unnumbered volume will simply be made by general reference to the supplemental record.

After serious objection (Supp. R.) as to the trial of the matter concurrently, the learned trial judge raising the issue himself (R. 37, Tr. 4), and after the question was determined by the Honorable John F. Wahlquist by his requirement to counsel that if the matter was to proceed upon joint trial the office of the District Attorney was to present a motion for consolidation (Supp. R. at 5), and it further appearing that an ex parte motion to consolidate was filed together with an unsigned order at (R. 14, 15), counsel apparently conceded in the concurrent trial.

The matter proceeded upon trial without a jury, the District Attorney's office presenting its evidence in alternative cross-fire order with respect to the co-defendant Peterson and back again with respect to the defendant-appellant Clements.

The first witness called by the State testified briefly that he was the administrator of the Ogden Clinic and knew generally who had keys to the building and who didn't. The building manager did not know either of the defendants and prior to the date of trial had not seen either of them before. He further testified that to his knowledge they were not among those authorized to be present during after hours (R. 39, 40, Tr. 6, 7).

The State's second witness, Patrolman Moore, testified that he responded to a call the evening of April 18th, 1970, at 11.21 p.m. and was in the area so he went to inspect as a back-up man and was on the scene in forty seconds. He testified that he, upon observing the south side, found it to be secure and " . . . found all the windows secure. . . (Tr. at 42)." Patrolman Moore then testified that he observed two men inside the clinic at the pharmacy door by the illumination from the parking lot lights shining into the building and then later testified that the two defendants in the courtroom (some six months later) were the two men he ob-

served inside the Ogden Clinic at the pharmacy door. Patrolman Moore did not observe the defendants accused the evening of the alleged burglary after his observation at the Ogden Clinic pharmacy door. Patrolman Moore was not present when the defendants were taken into custody (Tr. 12).

The next State's witness, Sergeant Brooks, testified that he had held over forty minutes from his shift end to assist "them". (Tr. 13). Sergeant Brooks searched the ground floor of the clinic together with Officer Cragun, and it was in Cragun's presence that the defendant-appellant Clements was observed voluntarily coming out of a dead stair space closet. A review of the rather brief transcript of proceedings indicates that there was confusion in the mind of Officer Cragun and of Sergeant Brooks as to who placed Clements under arrest, and each of them testified they thought that Sergeant Stettler had read Clements a Miranda warning. The other testifying officers had to do with the co-defendant Peterson and none of them observed Clements on the scene or after the arrest. The record does show that the defendants were present at night, in a place they apparently were not supposed to be. There is no evidence as to any stolen property or intent to commit larceny. A .357 magnum revolver was found in the approximate area of defendant-appellant Clements' hiding place but without reference to any identification, serial number, finger prints, and there was no testimony that Clements knew of its presence or exercised any dominion or control over the same. The record goes on to show as a justification by Officer Coleman for dragging the co-defendant Peterson along down the hall in the furtherance of the officer's search for trespassers that six cartridges of the .357 mangum type were found in the defendant Peterson's pockets (Tr. 26, R. 59). The State's Exhibit A, .357 mangum revolver, Exhibit B, six cartridges, and a second .357 revolver by stipulation found in the defendant-appellant Clements' automobile without regard to its location, were offered and received by the trial judge as evidence.

The defendant-appellant Clements was found guilty and sentenced to the Utah State Prison for a term of from one to twenty years and particularly charged with and found guilty of violation of Utah Code Annotated, § 76-9-3 (1969 Supp.). The provision referred to is quoted in full text hereinbelow:

> "Every person who forcibly breaks and enters, or without force enters an open door, window or other aperture, of any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, or any tent, sheep or cattle camp, vessel, watercraft, railroad car, automobile, automobile trailer, aeroplane or aircraft with intent to commit larceny or any felony, is guilty of burglary in the second degree."

The above quoted statute was recently amended and the admittedly tenuous distinction between daytime and nighttime is no longer important with respect to the degree of burglary committed. The Legislature in its wisdom added a new crime, that is, being somewhere one should not be, and is set forth in 76-9-9 (1969 Supp.) with the designation thereof "misdemeanor."

POINT I

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION OF SECOND DEGREE BURGLARY

It is defendant-appellant's position that the amended statute with regard to second degree burglary still requires, to be constitutionally valid, a specific intent. At common law and prior to the statutory amendment discussed herein, the crime of burglary required a specific intent. Roberts v. State, 136 Tex. App. 138, 124 S.W. 128; Hooks v. State, 145 Tenn. 43, 389 S.W. 529. The gist of the crime with regard to intent is well explained in People v. Morton, 4 Utah 407, 11 Pac. 512 (1886), wherein the court concluded that a previous plan to commit larceny taken together with a breaking and entering at night and burglary tools consisting of a drill bit and others, were sufficient to sustain the element of the necessary larcenous or felonious intent. It is conceded by appellant that proof of the necessary intent may be implied from circumstances and by legislative declaration, the possession of recently stolen

property raises the inference without a counter explanation. Utah Code Annotated, § 76-38-1 (1953).

The record in the instant proceedings shows only that the accused was found in a place he wasn't supposed to be - that is all! Even though one officer stayed twenty minutes past the end of his shift to "assist them" and further that within five minutes there were eight patrol cars on the scene, the record fails to disclose any evidence of burglary or tools, there was no stolen property, and it is not even clear who arrested the defendant-appellant Clements.

This Court as a reviewing court should not arbitrarily tamper with evidence or proof where there is conflict in testimony and particularly where there has been a jury determination. In the instant case, however, the conviction and the necessary facts to sustain that conviction were found by the court and not by a jury, and it is vigorously argued by appellant Clements that, as in the case of State v. Pratt, 25 Utah 2d. 76, 475 Pac. 2d 1013 (1970), this Court could review the record as a whole and should reverse where the prosecutor's case in chief, the testimony taken as a whole, is wholly insufficient to prove the crime as charged. In State v. Pratt, supra, at page 1014 of the Pacific Reporter, this Court observed

> " . . . that defendant's presence at the scene of a wrongdoing is insufficient to show his guilt beyond a reasonable doubt."

If the applicable law relating to the crime of second degree burglary requires as part of the prosecutor's case in chief, a proof beyond reasonable doubt of a specific intent to commit larceny or some other felony, the defendant-appellant Clements is and was justified in not presenting evidence of intoxication at the time in his own behalf. The officers who observed Clements emerge from his hiding place did not volunteer these facts, nor where they asked. The defendant-appellant Clements was represented by counsel at the trial, and who could not reasonably

have been anticipating a conviction and not reasonably failing to adduce or elicit testimony with respect to Clements' intoxication at the time, did not raise any facts in regard to Clements' intoxication. It is not clear from the present amendment to the statute relating to second degree burglary whether the legislative intent to abandon the specific intent relating to burglary is made an element of the crime or not.

POINT II

THE STATUTE UPON WHICH CONVICTION WAS MADE IS UNCONSTITUTIONAL; ITS REQUIREMENTS BEING AMBIGUOUS, VAGUE AND UNCERTAIN

The requirement that a penal provision or enactment by the people, the violation of which may be the subject of imprisonment, must set forth with particularity the acts or conduct making the elements of the crime well known to the public at large. This is so in the instant case by virtue of the record failing to reflect the otherwise available defense of heavy intoxication which, prior to the amendment to the second degree burglary statute, would have been an absolute defense. If counsel for defendant Clements did not raise the defense because by the terms of the statute it was so ambiguous as to whether or not it would be a valid defense, and whether or not the court on its own motion should have inquired into the state of mind of defendant, and whether or not the prosecutor and his witnesses had a duty to do so, is all uncertain and unclear by the very terms of the statute with which defendant was charged. If the legislative intent with respect to the statutory amendment for second degree burglary was to eliminate the requirement of specific intent, then it is submitted that at common law the gist of the crime of burglary was the breaking of a place of storage of chattels or man's habitat with felonious intent at the time of entry, that the crime of second degree burglary must still require the necessary larcenous intent. It is submitted that voluntary

intoxication is no defense to a crime that does not require a specific intent. The concept is broadly expressed and stated in Nieto v. People, 383 Pac. 2d 321 (Colo. 1963). In the case of State v. Turner, 3 Utah 2d 285, 282 Pac. 2d 1045 (1955), this Court affirmed the conviction where assigned error was based on a failure to instruct on defense of intoxication, the Court concluding that the crime of sodomy did not require a specific intent as an element of the crime. That voluntary intoxication or severe and uncontrolled hallucinations caused by intoxication and other factors not completely within the control of defendant are recognized as a valid defense to the crime of burglary is recognized in State v. Pellay, 7 Utah 2d 308, 324 Pac. 2d 490 (1958), wherein great weight within the record and submitted separately to the jury was whether or not, in view of his drinking, the defendant had entered for an innocent or a felonious purpose. The rule of law in this state is set forth quite clearly citing previous cases dealing with first degree murder which, also require a specific intent, in State v. Hartley, 16 Utah 2d 123, 396 Pac. 2d 749 (1964) as follows:

> "Thus, a night time forcible entry to a house, or an entry without force through an open door, with intent to commit larceny, is second degree burglary. But, if on account of voluntary intoxication the accused did not have the necessary intent to commit larceny, the jury should take into consideration the evidence of intoxication in determining the existence of the necessary intent (396 Pac. 2d at 750)."

It is submitted by appellant herein that because of the ambiguity of the statute presently relating to second degree burglary, conviction could now or then be had without proof of specific intent, then the defense of the defendant-appellant's state of mind was reasonably and justifiably not made a part of the record below.

That this Court should consider or remand for a new trial the basic arguments raised herein do not absolve defendant-appellant from

his acts completely but simply do not present a case for the commission of the crime with which defendant was convicted and sentenced to prison.

In reversing the conviction of first degree murder and ordering a new trial, this Court recognized its duty with regard to prejudicial errors not previously assigned or argued in the record below as follows:

> " . . . yet this Court . . . may and should sua sponte consider manifest and prejudicial errors which are neither assigned nor argued. State v. Stenback, 2 Pac. 2d 1050 (Utah 1931); State v. Riley, 41 Utah 225, 126 Pac. 294 (1911)."

In State v. Stenback, supra, the Supreme Court of the State of Utah at 2 Pac. 2d 1054 observed with regard to intoxication that:

> " . . . if at the time of the commission of such an offense the accused was by intoxication so entirely deprived of his reason that he did not have the mental capacity to entertain the necessary specific intent which is required to constitute a crime, he must necessarily be acquitted; and in like manner the fact of defendant's drunkenness should be considered in determining the degree of the crime. This is so, not because drunkenness excuses crime but because if the mental status required by law to constitute crime be one of specific intent or of deliberation and premeditation, and drunkenness excludes the existence of such mental state, then the particular crime charged has not in fact been committed."

POINT III

THE ENTIRE PROCEEDINGS RESULTING IN THE CONVICTION OF THE DEFENDANTS WERE SO FRAUGHT WITH SUBSTANTIVE AND PROCEDURAL ERROR THAT THE RIGHTS OF APPELLANT WERE MATERIALLY PREJUDICED

Defendant-appellant Clements did not raise the defense of intoxication in the proceedings below, nor did his counsel move for a new trial. Defendant's state of mind was affected both by voluntary consumption of liquor and the imbibement of drugs causing a state of mind undefinable but clearly absolving any intent necessary if the crime was still requirement of the degree of intent prior to the statutory amendment. It is submitted that there is a direct pecuniary conflict of interest wherein defense counsel could not consistently ask the court for a new trial with

respect to certain evidence being preserved for the payment of his fee (R. 76, 77, Tr. 43, 44).

It is to be further noted that the defense was not within the ambient of "newly discovered evidence" necessary to preserve defendant's motion for a new trial beyond the time limits set forth in Utah Code Annotated, § 77-38-4 (1953).

The failure to move for a new trial and present counsel's inability to do so is further compounded by the procedural error in transmitting the record herein to the Supreme Court which, by recent amendment to the Code of Criminal Procedure, requires that such record be transmitted within thirty days after filing of Notice of Appeal, when, in fact, the record was held up in the Second Judicial District Clerk's office for approximately seventy days.

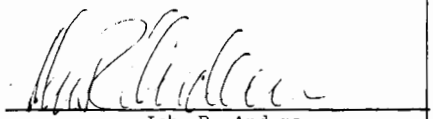
Appellant is not unmindful of the general principle of mere errors in procedure cannot be treated as a denial of due process (Gruger v. Burke, 334 U. S. 728 (1948). The instant case, however, involves the application of a recently amended penal statute, it involves procedural errors constituting a sixty day delay in transmitting the record on appeal, and it further involves a maximum prison sentence of twenty years. Present counsel is concerned with the joint trial when there was never any order signed in the record allowing for such consolidation, and with the discussion with previous trial counsel the apparent continuing of the trial at the request of the District Attorney of the Second Judicial District in order not to insure a fair resolution of the facts or whether the crime had been committed, but in order to insure that the defendants would not be released on a writ of habeas corpus.

CONCLUSION

It is respectfully submitted by appellant-defendant Clements

that in order to comply with the minimal requirements of procedural due process and fairness, the matter should be reversed and remanded with a view to construing the statute under which he was convicted as not changing the elements of the crime of second degree burglary as they existed at common law and upon the enactment of the United States Constitution and thus allowing him, where the office of the prosecuting attorney below did not feel a duty to do so, to present his defense of state of mind proving beyond doubt that the crime was not, in fact, committed.

Respectfully submitted,



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Dated: May 11th, 1971